Supreme Court, U.S.
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No. 05-523

In The

Supreme Court of the United States

MARY MILES,

Petitioner,

v.

SIERRA CLUB et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITION FOR A WRIT OF CERTIORARI

PAUL RICHARD KLEVEN
Counsel for Petitioner
1604 Solano Avenue
Berkeley, California 94707
(510) 528-7347

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the First Amendment requires a defamed individual to meet the heavy burdens imposed on limited purpose public figures when she has engaged in only private conduct, and there was no public controversy that gave rise to the defamatory speech.

2. Whether unrelated conduct that occurred before any particular controversy giving rise to the defamatory speech can convert a private individual into a limited purpose public figure.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below as defendants and respondents: Ronald Guenther and Roanne Withers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary Miles respectfully prays that a writ of certiorari issue to review the judgment and opinion of the First District Court of Appeal for the State of California entered and filed in the above-entitled proceedings on April 20, 2005.

OPINIONS BELOW

The opinion of the Court of Appeal of California, First Appellate District, appears in Appendix A. It is unpublished in the California Reports, but appears at 2005WL906357, and 2005 Cal.App.Unpub. LEXIS 3471.

JURISDICTION

The opinion of the Court of Appeal of California, First Appellate District, was entered and filed on April 20, 2005, and appears as Appendix A. The Court of Appeal denied a timely petition for rehearing on May 13, 2005. App. E. On June 3, 2005, petitioner timely filed a petition for review with the California Supreme Court, which was denied by order filed July 13, 2005. App. B. This petition for certiorari is filed within 90 days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. section 1257, subdivision (a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This libel action arose out of the respondents' publication of a March 31, 1999 letter regarding petitioner Mary Miles. Respondents Ron Guenther and Roanne Withers wrote the letter to Sierra Club Executive Director Carl Pope on official Sierra Club letterhead, and sent copies to individuals, prominent environmental organizations, and two newspapers. The letter is reproduced in Appendix F.

Following trial, a jury concluded that the letter contained false and defamatory statements about Miles, but that she had not established by clear and convincing evidence that the defamation had been made with knowing or reckless falsity. App. C at A-48. Since the trial court had pronounced Miles a limited purpose public figure, judgment was entered against her. App. C at A-47-48. The Court of Appeal of California, First Appellate District, affirmed the judgment, App. A at A-45, and the California Supreme Court denied a timely petition for review. App. B at A-46.

Respondent Sierra Club is an environmental organization that governs its members by subentities called chapters and groups. Respondents Guenther and Withers

were, respectively, the chair and secretary of the Mendocino/Lake Group (the "Group"), a 1,000 member subunit of the Sierra Club's Redwood Chapter. They lived together and ran the Group out of their home.

Petitioner Mary Miles is an attorney and a longtime member of the Sierra Club who was living in Mendocino County in the late 1990s. She became concerned that the Group was not being run democratically and did not adequately represent all of its members. In 1998, she communicated with the chair of the Redwood Chapter, Marianne de Sobrino, about forming an inland group. Reporter's Transcript ("RT") 642, 644.

De Sobrino encouraged Miles to form an inland group and expressed concerns that the Group's elections had not been conducted "by the rules." In early 1999, she advised Miles to make a complaint to the national organization of the Sierra Club, and to document it with bylaws, minutes and other records, which she should request from the Group. Trial Exhibit ("Ex.") 14.

Following de Sobrino's advice, on March 10, 1999, Miles wrote a letter to the Chair of the Group requesting the Group's bylaws, minutes and other documents. Ex. 5. Guenther denied the request, and Miles appealed the decision to Sierra Club Executive Director Carl Pope. Ex. 27, Guenther at 95-97; RT 1448-49. Pope instructed Guenther to produce the records, and told him that Miles, as a member, had a legal right to the records. RT 918, 1148, 1158-62, 1179, 1202-04.

Furious, Withers drafted the March 31, 1999 letter that prompted this litigation; Guenther added its first paragraph and signed it as the chair of the Mendocino/Lake Group.

App. F at A-51-56; RT 1051-52, 1496; Ex. 27, Withers at 55-56.

Guenther began the letter, which was sent on official Sierra Club letterhead, by complaining about what he considered Pope's "unreasonable" instruction to deliver the Group records to Pope's office by April 1, 1999. Guenther had not seen any of Miles' correspondence with Pope or de Sobrino, and had no idea of the nature of her complaint, though he did acknowledge having denied her request for records. App. F at A-52; RT 910-13, 1485-86; Ex. 27 Guenther at 95-97.

After admitting that he had never met Miles, Guenther stated in the letter that unnamed sources had advised him that "Mary Miles has been institutionalized in the past and is on the verge of a serious breakdown again," and that Guenther "consider[ed] her to be a most dangerous paranoid schizophrenic." A different anonymous member reportedly believed Miles "is very dangerous in a physical sense and is frightened of her. . . . I believe some may be willing to testify in court to Miles' irrational and frightening behavior." Guenther further indicated that Miles' presence at a Sierra Club meeting would likely require police presence. App. F at A-55.

The only one of the alleged sources who acknowledged making any of the statements in the letter was Withers, who wrote it. Three alleged sources denied providing the information, and there was no documentary evidence to support any of the statements. RT 484-91, 511-15, 518-20, 522-26, 939, 1050-52, 1437, 1473-78; Ex. 27 Withers at 18-22, 36-37; Ex. 27 Guenther at 35-39.

Withers mailed the letter not only to Pope but also to individuals, environmental organizations and two local

newspapers. One of these newspapers was the *Anderson Valley Advertiser*, a weekly newspaper in Boonville, California, where Withers worked as a paid staff member. RT 1487, Ex. 27 Withers at 27.

After mailing the letter, Withers spoke with the owner and publisher of the *Anderson Valley Advertiser*, Bruce Anderson, who published a column in the next edition of the paper on April 7, 1999, denouncing Miles as "crazy" and a "nut case" for requesting the documents. Ex. 6; Ex. 27 Withers at 71, 74-76; RT 1427-28, 1493-94. Prior to that column, Miles' request to the Group had never been made public. RT 1186, 1204; Ex. 7, Ex. 27 Pope at 27-29.

Following trial, the jury unanimously concluded that the respondents' March 31, 1999 letter contained false and defamatory statements about Miles. App. C at A-48. But the Superior Court of California, County of San Francisco, had determined that Miles was a limited purpose public figure,[1] requiring her to prove by clear and convincing evidence that defendants had published the false statements with knowing or reckless falsity. Nine of the twelve jurors concluded that Miles had not met this burden. App. C at A-48. The Superior Court entered judgment (App. C), and by minute order denied petitioner's motion for new trial. App. D at A-49.

On appeal, the Court of Appeal of California, First Appellate District, affirmed the judgment and upheld the trial court's determination that Miles was a limited purpose public figure under *Gertz v. Robert Welch, Inc.*, 418

[1] Respondents had from the outset asserted petitioner's status as a limited purpose public figure as an affirmative defense. (Answer to First Amended Complaint., May 17, 2000 ¶6.)

U.S. 323, 344-46, 351-52 (1974) App. A at A-39, 45. This was the principal issue raised in petitioner's Petition for Review to the California Supreme Court (Petition for Review, June 3, 2005), which was denied without opinion on July 13, 2005. App. B at A-46. There were no independent state law grounds for the judgment against petitioner, or the Court of Appeal's decision affirming that judgment.

The Court of Appeal "defin[ed] the public controversy as whether the Mendocino/Lake Group of the Sierra Club was performing as effectively as local environmentalists would wish," and said that controversy had arisen after the Mileck dump hearing. App. A at A-36.

Analyzing Miles' role in that controversy, the Court of Appeal found arguable support for the trial court's decision that Miles was a public figure in "three strands of activity . . . her public stand against the Mileck dump, her nine-month 'crusade' against the Group and its executive committee, and her 'M' cartoons." App. A at A-32.

Mileck Dump: On May 11, 1998, Miles attended a public hearing regarding an Environmental Impact Report prepared in connection with a permit to operate a local waste facility, referred to in the opinion as the "Mileck dump." Before the hearing, Miles discussed the Mileck dump with Withers.

Two months after the hearing, a column by Rob Anderson appeared in the July 15, 1998 issue of the *Anderson Valley Advertiser*. Miles had no involvement with the column, and did not know it was being prepared. RT 265, 618-20, 650-51. At some time in the past, Miles had given Rob Anderson information about the Mileck dump, but not about the Sierra Club or Withers. RT 618, 650-51.

Withers complained to Bruce Anderson about the column, and he invited Withers to respond, publishing her response on July 22, 1998, along with his own column.[2] Ex. 27, Withers at 52-53, 67-69; RT 1251-52, 1331. The defamatory March 31, 1999 letter made no reference to the Mileck dump, to Rob Anderson's column, or to Withers' and Bruce Anderson's responses. App. F at A-51-56; RT 1051-52.

Crusade Against Group: The Court of Appeal referred to Miles' three letters to de Sobrino and single letter to the Group as a "campaign" or "crusade," and noted that Bruce Anderson found that "Miles' efforts to unseat leaders of the local Sierra Club group were . . . newsworthy." App. A at A-32-33, 37-38. The Court of Appeal emphasized the timing of Miles' initial letter to de Sobrino, which was sent shortly after Bruce Anderson published the responses to Rob Anderson's column, but none of the letters referred to the Mileck dump. RT 642-44, 709-10, 749-54, 808, 810; Ex's. 13, 14.

Neither Guenther nor Withers was aware of the content of Miles' letters to de Sobrino or of any efforts to unseat them, and their March 31, 1999 letter made no reference to any such efforts. RT 910-11, 913, 1485-86. Neither Miles, Guenther, nor Pope considered Miles' correspondence with the Sierra Club to be a public matter, and there was no mention of the correspondence in any

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[2] Although the Court of Appeal decision relies heavily on the three newspaper publications, none was admitted into evidence. Withers initially speculated that Miles was involved in the preparation of the Rob Anderson column, but dropped that claim at trial, and respondents did not call Rob Anderson as a witness. Ex. 27 Withers at 52-53; Court of Appeal Appendix ("AA") 406.

public forum until after respondents defamed Miles. RT 807-808, 910-13, 1014, 1175-79, 1186-87, 1485-86; Ex. 7.

"M" Cartoons: From 1986-1996, Miles had published political cartoons illustrating articles in the *Anderson Valley Advertiser* under the pseudonym "M." Although the Court of Appeal characterized some of these cartoons as "*quite* disturbing," App. A at A-35, and there was evidence that some people were aware that "M" was Miles, the cartoons had nothing to do with the Mileck dump, the Sierra Club, Guenther or Withers, and the last cartoon in the record was published six years before the March 31, 1999 letter, which made no mention of them. RT 1051-52, 1298-99. The Court of Appeal concluded that the "vividness" of the cartoons "satisfies us that these drawings remained relevant to the issue of whether Miles was a limited purpose public figure." App. A at A-35.

Finally, though the defamatory letter made no reference to any public controversy, including the one identified by the Court of Appeal, the Court concluded that "the statements in the March 31 letter all pertained to the part Miles played in the ongoing controversy." App. A at A-39.

REASONS FOR GRANTING THE WRIT

There are three reasons why the issues in this Petition are appropriate for the Court's review. First, the opinion in this case conflicts with this Court's holdings on every aspect of the limited purpose public figure classification in defamation, disregarding the basic requirements of public debate and public conduct. Next, this case illustrates the inconsistencies and unpredictable results that characterize the lower courts' rulings in this area.

Finally, these issues are ripe for resolution, because in the quarter century since the Court last considered them, thousands of limited purpose public figure cases have risen to the appellate level with widely varying results. The disarray in the lower courts has resulted in an *ad hoc* approach that potentially exposes nearly every libel plaintiff to the burdens that accompany the public figure classification, with no assurance that the First Amendment requires the sacrifice of their good names

I

THE OPINION BELOW CONFLICTS WITH THIS COURT'S FIRST AMENDMENT DECISIONS, WHICH RESTRICT THE LIMITED PURPOSE PUBLIC FIGURE CLASSIFICATION TO THOSE WHO HAVE ENGAGED IN PUBLIC CONDUCT TO INFLUENCE THE RESOLUTION OF PUBLIC CONTROVERSIES

This Court created the limited purpose public figure classification as part of its ongoing attempt to "define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

In 1964, the Court had held that, under the First Amendment, defamed public officials could not recover damages unless they proved by clear and convincing evidence that a statement had been made "with knowledge that it was false, or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Three years later, the Court required

public figures to meet the demanding *New York Times* standard. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967).

But in *Gertz*, 418 U.S. at 343, the Court refused to impose the *New York Times* burden on private individuals, recognizing that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 418 U.S. at 345. Public figures are less vulnerable because they typically enjoy access to the media, and are less deserving because, by "assum[ing] roles of especial prominence in the affairs of society, . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345. Imposing the *New York Times* standard on private individuals would unnecessarily sacrifice the "strong and legitimate state interest in compensating private individuals for injury to reputation." 418 U.S. at 348.

Public figures are those who have "assume[d] special prominence in the resolution of public questions." *Gertz*, 418 U.S. at 351. If there is "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society," 418 U.S. at 352, a person may be considered a public figure for all purposes.

But in most cases, an individual "should not be deemed a public personality for all aspects of his life." *Gertz*, 418 U.S. at 352. "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," 418 U.S. at 345, and are therefore public figures only "for a limited range of issues." 418 U.S. at 351. In deciding whether a private individual

has become a limited purpose public figure, courts must look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352.

Although Elmer Gertz was a prominent Chicago lawyer and author who was representing a family in a civil suit against a homicidal police officer, the Court determined that he was a private individual for purposes of a libel suit arising out of a magazine article about the officer's prosecution for murder. *Gertz*, 418 U.S. at 325-26, 351-52. Since Gertz had played no role in the criminal prosecution of the officer, and had never discussed the issue with the press, "he plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. at 352.

Less than two years after *Gertz*, this Court further restricted the limited purpose public figure classification in *Time, Inc. v. Firestone*, 424 U.S. 448, 453-54 (1976), holding that a prominent socialite who had attended press conferences about her high-profile divorce proceedings was not a public figure. While the divorce was a "cause célebre," it was not the sort of public controversy required by *Gertz*, and despite her press conferences, Mary Firestone had done nothing to "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." 424 U.S. at 453-54.

The last time the Court addressed the issues raised by the limited purpose public figure classification was in 1979, when it decided the cases of *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). In *Hutchinson*, the Court

rejected the contention that a general concern about public expenditures constituted a public controversy, and held that the controversy generated when scientist Ronald Hutchinson received a "Golden Fleece" award from a prominent senator did not make him a public figure, even though Hutchinson responded in the press to the announcement. *Hutchinson*, 443 U.S. at 114, 134-35. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." 443 U.S. at 135.

The Court also held that Ilya Wolston was not a public figure, even though his failure to appear before a grand jury and subsequent contempt citation had prompted numerous newspaper articles, because a "libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." *Wolston*, 443 U.S. at 167. Assuming there was an actual public controversy about the investigation of Soviet espionage, 443 U.S. at 166 n.8, Wolston never discussed the matter with the press, and never "engage[d] the attention of the public in an attempt to influence the resolution of the issues involved." 443 U.S. at 166-67.

As this Court's decisions make clear, in order to become a limited purpose public figure, a private individual must thrust herself into the vortex of a particular public controversy in an attempt to influence its outcome, and her participation in that particular controversy must give rise to the defamation. *Gertz*, 418 U.S. at 352; *Firestone*, 424 U.S. at 453-54; *Hutchinson*, 443 U.S. at 134-35; and *Wolston*, 443 U.S. at 166-67. In each of these cases, the Court was careful not to require the defamed individuals to meet the onerous *New York Times* burden, even

though all of the plaintiffs were much closer to being public figures than Mary Miles has ever been.

The opinion in this case directly conflicts with the above holdings of this Court on critical elements underlying the limited purpose public figure issue. As a result, a deserving plaintiff intentionally subjected to injury has been denied recovery because she was "unable to surmount the barrier of the *New York Times* test," *Gertz*, 418 U.S. at 342, even though there is no "convincing assurance that such a sacrifice is required under the First Amendment." *Firestone*, 424 U.S. at 456.

A. Unless There Is A Public Controversy, There Can Be No Limited Purpose Public Figure

At the outset, the Court of Appeal's determination that there was a public controversy regarding the effectiveness of the Group's performance conflicts with *Firestone*, 424 U.S. at 453-54, because only the Anderson brothers and Withers were publicly considering this issue, and there was no evidence that Miles had any part in the dispute.[3]

The opinion below ignores an essential component of the public controversy requirement – the public. Even assuming that members of the community were debating the issue, or that statements by three individuals in one weekly newspaper constituted a "public" controversy, this

[3] Since none of the July 1998 statements in the *Anderson Valley Advertiser* were admitted into evidence, there is actually no evidence that even those three individuals were considering the issue. Miles denied discussing the issue with Rob Anderson, or being aware that he was writing the July 15, 1998 column. RT 618-20, 650-51.

Court's decisions precluded the Court of Appeal from characterizing Miles as a public figure without any evidence that she attempted to influence the outcome of that particular public controversy.

Like Gertz and Wolston, Miles never discussed the controversy with the press. While she had spoken with Rob Anderson about the Mileck dump, there was no evidence that she had ever discussed the Sierra Club, the Group, Guenther or Withers with any member of the media. *Gertz*, 418 U.S. at 352; *Wolston*, 443 U.S. at 166-67.

Attendance at a public hearing does not, under this Court's holdings, transform an individual into a public figure. App. A at A-32, 39. Gertz had attended an inquest, and Firestone and Wolston attended court proceedings, all of which were apparently more newsworthy than the Mileck dump hearing at which Miles appeared. *Gertz*, 418 U.S. at 352; *Firestone*, 424 U.S. at 453-454; *Wolston*, 443 U.S. at 166-167.

Reliance on the "newsworthiness of Miles' challenge to the local Sierra club group leadership," App. A at A-32-33, also conflicts directly with this Court's holdings. "Newsworthiness" is not a sufficient basis for establishing public figure status, *Wolston*, 443 U.S. at 167, *Hutchinson*, 443 U.S. at 135, and Bruce Anderson's denunciation of Miles was published at the behest of the defamer, Withers, who could not immunize herself by publicizing her defamation of Miles.

B. An Individual Who Engages In Only Private Conduct Cannot Be Classified As A Limited Purpose Public Figure; There Must Be Public Conduct Intended To Influence The Resolution Of A Public Controversy

This Court justified the imposition of *New York Times* burdens on public figures in part because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Mary Miles did not enjoy that type of access and, unlike Ronald Hutchinson, was not even able to respond in the press once she had been defamed. *Hutchinson*, 443 U.S. at 135.

Instead, Miles pursued her goals as a private individual would, by writing letters to de Sobrino, the Group, and Pope. The Court of Appeal's determination that Miles became a limited purpose public figure when she privately communicated with responsible officials within the Sierra Club, App. A at A-32, 36-39, is contrary to the "compelling normative consideration underlying the distinction between public and private defamation plaintiffs," *i.e.*, that public figures "invite attention and comment" and so "run [] the risk of closer public scrutiny." *Gertz*, 418 U.S. at 344-45.

In writing those letters, Miles did not seek the public's attention with "vigor and success," *Gertz*, 418 U.S. at 342, and her actions were not "calculated to draw attention to [herself] in order to invite public comment or influence the public with respect to any issue." *Wolston*, 443 U.S. at 168. Miles did not "engage the public's attention" in an attempt to influence the outcome of any controversy. *Gertz*, 418

U.S. at 352; *Firestone*, 424 U.S. at 453-54; *Hutchinson*, 443 U.S. at 135-36; *Wolston*, 443 U.S. at 167-68.

Like Firestone, who was compelled to go to court to end her marriage and did not "freely choose to publicize issues," *Firestone*, 424 U.S. at 454, Miles followed the only process available to her; in doing so, she "relinquished no part of [her] interest in the protection of [her] own good name." *Gertz*, 418 U.S. at 345. This Court has recently reaffirmed the need to protect private communication in order to "encourage the uninhibited exchange of ideas among private parties," *Bartnicki v. Vopper*, 532 U.S. 514, 532-33 (2001), and it would be contrary to First Amendment principles if engaging in such private communications could transform an individual into a public figure.

Even if Miles had communicated with the press, there would have to be evidence that those communications were intended to affect the outcome of that controversy. Mary Firestone had "held a few press conferences," but that did not "convert [] her into a public figure" because she did not attempt to affect the resolution of her marital proceedings. *Firestone*, 424 U.S. at 454 n.3.

Miles' communication with Rob Anderson about the Mileck dump was not relevant to the public figure classification, unless it could be assumed that she intended by that communication to affect the resolution of a public controversy regarding the Sierra Club, an issue she did not even discuss with him.

C. An Individual Cannot Be Classified As A Limited Purpose Public Figure Unless Her Participation In A Public Controversy Gave Rise To The Defamation

Even if Miles had participated in a public controversy about the effectiveness of the Sierra Club Group, the defamation in the March 31, 1999 letter had nothing to do with that issue, but was a malicious personal attack. Since respondents' claims that Miles had been "institutionalized" and was a "dangerous paranoid schizophrenic" had nothing to do with the Sierra Club's effectiveness, she could not be considered a public figure with respect to those claims unless she could be considered an all-purpose public figure, *Gertz*, 418 U.S. at 345, 351-352, a contention never advanced by respondents or any of the lower courts.

Under *Gertz*, 418 U.S. at 352, a limited purpose public figure must meet the *New York Times* standard only if her participation in a public controversy "giv[es] rise to the defamation." When they defamed Miles, Withers and Guenther had no knowledge of her correspondence with de Sobrino or of any alleged efforts to unseat them, and no idea why Miles was even requesting the documents. App. F at A-52-54; RT 910-11, 1485-86. Respondents' March 31, 1999 letter contained no reference to the Mileck dump, or Rob Anderson's column. App. F; RT 1051-52.

In this case, the purported public controversy did not in any way prompt respondents to publish the March 31, 1999 letter. Requiring Miles to prove that respondents acted with knowing or reckless falsity when they defamed her served absolutely no constitutional purpose, because "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and

wide-open' debate on public issues." *Gertz*, 418 U.S. at 340, quoting *New York Times*, 376 U.S. at 370.

D. Unrelated Prior Conduct Has No Bearing On Whether An Individual Can Be Classified As A Limited Purpose Public Figure

Miles' anonymous cartoons could not transform her into a limited purpose public figure in connection with a public controversy that did not arise until years after the publication of the last cartoon. *Gertz*, 418 U.S. at 325-26, 351-52. Gertz's status as a prominent attorney and author who was "well known in some circles" did not strip him of his rights as a private individual when he was defamed in connection with a particular, subsequent controversy. 418 U.S. at 351-352. Similarly, Firestone's celebrity status did not make her a public figure for purposes of defamatory statements regarding her divorce. *Firestone*, 424 U.S. at 453-54.

Since Miles was not an all-purpose public figure, the cartoons are irrelevant to the public figure determination. By definition, a limited purpose public figure is "a public figure for a limited range of issues," *Gertz*, 418 U.S. at 351, not for any issue that the defamer chooses to use as a basis for attack.

In this case, the Court of Appeal ignored the constitutional balance carefully established by this Court in *Gertz* and its progeny, with the result that a deserving plaintiff, who the jury unanimously agreed had been defamed by the defendants, has lost the right to receive compensation for her damaged reputation.

This Court should grant the petition for writ of certiorari to address the conflicts between the decision below and the holdings of this Court.

II

THE LACK OF GUIDANCE FROM THIS COURT ON THIS ISSUE OVER THE LAST QUARTER CENTURY HAS RESULTED IN A CONFLICTING, INCOHERENT BODY OF CASE LAW THAT REQUIRES LITIGANTS TO SPECULATE AS TO WHETHER THE HEAVY BURDENS IMPOSED BY *NEW YORK TIMES* WILL APPLY

In 1980, the District of Columbia Court of Appeal lamented, "Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980.) In the quarter century since *Waldbaum*, this Court has still not fleshed out those descriptions, with the result that the decision in this case is far from the only example of lower courts ignoring or misunderstanding this Court's holdings on the limited purpose public figure issue.

Despite this Court's effort in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) to avoid "an ad hoc resolution of the competing interests at stake in each particular case" by "lay[ing] down broad rules of general application," the absence of any guidance by the Court since *Hutchinson* and *Wolston* has "lead to unpredictable results and uncertain expectations, and . . . could render our duty to supervise the lower courts unmanageable." *Gertz*, 418 U.S. at 343.

This is not simply petitioner's contention, but an opinion shared by all of the leading libel commentators. One has labeled the *Gertz* public figure rules a "failure" and "a dismal flop," that "seem incapable of rendering consistent results in a multitude of disparate factual situations." Bruce W. Sanford, *Libel and Privacy* §7.3.1, p. 7-58 (2d ed. 1994; Supp. 2004).

Another commentator observed that one court had "encapsulated the frustration with which lower courts have grappled with the public figure/private figure dichotomy: Demarcating between public and private figures 'is like trying to nail a jelly fish to the wall.'" 1 Rodney A. Smolla, *Law of Defamation*, § 2:21, p. 2-32 (2d ed. 2000) (rel. 11-5/05), quoting *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

Yet another states:

> The lack of a comprehensive definition or description of the term "public figure" in the Supreme Court and the divergent case law in the state and lower federal courts make the determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court . . . The method by which to determine who or what is a public figure remains inexact.

1 Robert D. Sack, *Sack on Defamation* § 5.3.6, p. 5-39 (3rd ed. 2004).

Professor Tribe has commented that, "[T]he doctrine has become a frustrating tangle for all concerned – a mysterious labyrinth for those seeking to clear their names and a costly and unpredictable burden for the

speakers the first amendment is designed to protect." Laurence H. Tribe, *American Constitutional Law* § 12-12 865 (2d ed. 1988).

The case law governing this issue is so confused that the courts cannot even agree on whether there are two, three, four or five steps involved in determining whether an individual has become a limited purpose public figure. *See Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1082 (3d Cir. 1985) (two steps); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980) (three steps); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (four steps); and *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982) (five steps).

A. Public Controversy Must Preexist The Defamation

The Court of Appeal's decision conflicts with federal and state authority in holding that a public controversy can exist without public debate or participation.

In *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), the Court held that a public controversy "must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." 627 F.2d at 1296. The dispute must have "received public attention because its ramifications will be felt by persons who are not direct participants." *Id.* The type of evidence that a court would need to consider in determining whether there was a public controversy, 627 F.2d at 1297, was simply not present in this case.

Most federal circuit and state supreme courts have followed *Waldbaum*'s threshold requirement of identifying an actual public controversy. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir. 1980); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir. 1984); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994); *Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 363 (8th Cir. 1996); *Bowman v. Heller*, 420 Mass. 517, 651 N.E.2d 369, 374 (Mass. 1995); *Wayment v. Clear Channel Broadcasting, Inc.*, 116 P.3d 271, 282-83, 2005 UT 25 (Utah 2005).

While the Court of Appeal in this case also invoked *Waldbaum*, App. A at A-35-36, its determination that there was a public controversy regarding the Sierra Club's effectiveness directly conflicts with the analysis in *Waldbaum* and the cases following it.

The opinion shows that, without this Court's guidance on this critical issue, lower courts are not bound by the analysis conducted in these cases and often ignore it. The Court should grant this petition in order to better supervise the lower courts. *Gertz*, 418 U.S. at 343.

B. Courts Often Flout This Court's Requirement That Limited Purpose Public Figures Must Engage In Public Attempts To Influence Particular Public Controversies

A number of lower courts, including the Court of Appeal in this case, are in direct conflict with this Court's requirement of a high threshold of public activity for an individual to become a limited purpose public figure. *Gertz*, 418 U.S. at 252; *Wolston*, 442 U.S. at 167.

Recently, for example, the District of Columbia Circuit held that a Navy pilot became a limited purpose public figure simply because she "chose" to be trained and suited up as a combat pilot amid a purported public controversy over the ability of women to be combat pilots. *Lohrenz v. Donnelly*, 350 F.3d 1272, 1278-82 (D.C. Cir. 2003). As in *Gertz*, there was no evidence that the plaintiff was inviting public attention or communicated with the media in an attempt to affect the outcome of the public controversy. *Id.*

Similarly, the District of Columbia Circuit has held that an individual was a public figure for merely having social contacts with local government officials. *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990).

In *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985), after complaining that the "Supreme Court has not provided a detailed chart of the contours of the public and private figure categories," 754 F.2d at 1082, the Third District held that an attorney was a limited purpose public figure in a public controversy about drug trafficking because his "occasional weekend trips with motorcycle gang members" were "bound to attract attention and comment," even though there was no indication that he sought to influence public opinion on drug trafficking. *Marcone*, 754 F.2d at 1082-87.

Marcone relied on the Fifth Circuit's holding in *Rosanova v. Playboy Enterprises*, 580 F.2d 859, 860 (5th Cir. 1979), which had held that the plaintiff was a public figure because he "voluntarily engaged in a course that was bound to invite attention and comment" without delineating a public controversy or identifying public conduct. The Court noted, "Although the public figure concept has eluded a truly

working definition, it falls within that class of legal abstractions where 'I know it when I see it.'" *Rosanova v. Playboy Enterprises*, 580 F.2d at 860.

After noting some divergence in case law in *Faigin v. Kelly*, 978 F. Supp. 420 (D.N.H. 1997), the district court held that a sports agent was a public figure even though he "publicly assumed no ideological position in the controversy surrounding sports agents' unscrupulous representation of athletes," determining that "the better position" was that simply entering a sphere of public concern was sufficient. 978 F. Supp. at 427-28.

These holdings conflict with *Gertz*, *Firestone*, and *Wolston*, as well as the decision of a different Fifth Circuit panel in *Braun v. Flynt*, 726 F.2d 245, 250 (5th Cir. 1984). The Second Circuit has adopted a strict, four-part test for determining whether the plaintiff has acted so as to inject himself into a public controversy to influence it, *Lerman*, 745 F.2d at 136-37, and a more recent Fourth Circuit decision reached a similar conclusion in *Wells v. Liddy*, 186 F.3d 505, 533-34 (4th Cir. 1999), as did the Eleventh Circuit in *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 361 (11th Cir. 1987). The Eighth Circuit has also clearly required that a plaintiff must attempt to influence the outcome of a public controversy in order to be a limited purpose public figure. *Lundell Manufacturing Company, Inc. v. American Broadcasting Companies, Inc.*, 98 F.3d 351 (8th Cir. 1996), and *In re IBP Confidential Business Documents Litigation v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 646 (8th Cir. 1986.)

In *Denny v. Mertz*, 100 Wis.2d 332 (1981), the Wisconsin Court of Appeal held that a dissident stockholder who wrote numerous letters and contacted the *Wall Street*

Journal, which published "a few" articles about the dispute, was not a limited purpose public figure because the corporation's "internal disputes and management problems" were not controversies that would have an impact on the general public. *Denny,* 100 Wis.2d at 335.

Similarly, in *Roffman v. Trump*, 754 F. Supp. 411, 418 (E.D. Pa. 1990), though the plaintiff spoke with, and was quoted by, a reporter in the *Wall Street Journal*, he was not a limited purpose public figure because he did not "actively participat[e] in the public issue in a manner intended to obtain attention." *Id.*

As these cases demonstrate, there is a deep rift among the circuits as to whether an individual must engage the public in order to influence the outcome of a public controversy in order to become a limited purpose public figure. Absent a more detailed holding from this Court better defining the contours of the limited purpose public figure category, some lower courts will continue to require private figures to meet the *New York Times* standard, even though they engaged in no public conduct, and made no public effort to influence the outcome of a controversy, contrary to *Gertz*, 418 U.S. at 345.

This case illuminates the need for the Court's review of this issue, because the opinion classifies Miles as a public figure despite the absence of any public controversy or of any public attempt to influence any controversy.

The Court should grant this petition to avoid this unjust divergence of outcomes on these similar cases.

C. Participation In The Public Controversy Must Give Rise To Defamation

The Court of Appeal's determination that Miles was a public figure for the purpose of challenging statements about her sanity that were totally unrelated to the effectiveness of the Sierra Club conflicts not only with *Gertz*, 418 U.S. at 352, but also with many lower court rulings.

The District of Columbia Circuit, for example, explicitly held that "the alleged defamation must be germane to the plaintiff's participation in the controversy. . . . Misstatements wholly unrelated to the controversy . . . do not receive the New York Times protection." *Waldbaum*, 627 F.2d at 1298. *Wells v. Liddy*, 186 F.3d 505, 533-34 (4th Cir. 1999), also ruled that the defamatory statements must be "made in connection with [the] public controversy."

Roffman v. Trump, 754 F. Supp. 411 (E.D. Pa. 1990), held that a market analyst whose abilities and personal integrity were attacked was not a public figure because the only public controversy was the viability of a casino enterprise. *Roffman*, 754 F. Supp. at 413, 417.

But the First District in *Pendleton v. City of Haverhill*, 156 F.3d 57 (1st Cir. 1998), held that plaintiff was a public figure for purposes of challenging an allegation of cocaine possession, even though the public controversy involved the racial composition of a school district in which he was seeking a teaching position. *Pendleton*, 156 F.3d at 68.

If the lower courts simply disregard this Court's directive to analyze "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," *Gertz*, 418 U.S. at 352, then an individual who might be considered at most a limited purpose

public figure will effectively and unnecessarily be "deemed a public personality for all aspects of his life." *Id.* This case illustrates the problem clearly, because the Court of Appeal's conclusion cannot be squared with *Gertz*.

D. There Is A Conflict Over Whether Prior, Unrelated Conduct Is Relevant To An Individual's Classification As A Limited Purpose Public Figure

The Court of Appeal's determination that unrelated, preexisting, anonymous cartoons were a "strand" of activity that helped convert Miles into a limited purpose public figure conflicts with this Court's opinions, but is consistent with decisions coming out of the District of Columbia Circuit.

Clyburn v. News World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990), for example, held that the plaintiff's contacts with officials within the District of Columbia made him a public figure in connection with a controversy over his girlfriend's drug overdose, and that "Clyburn's acts *before* any controversy arose put him at its center." 903 F.2d at 33 (emphasis in original.)

Similarly, the Court in *Waldbaum* had found that in determining public figure status a court should consider the "plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements." *Waldbaum*, 627 F.2d at 1297-1298.

Clyburn and *Waldbaum* squarely conflict with the California Supreme Court's decision in *Khawar v. Globe Internat., Inc.*, 19 Cal. 4th 254 (1998). *Khawar* held that a plaintiff's conduct occurring before the relevant controversy

arose was "of no legal significance" in the limited purpose public figure determination. 19 Cal. 4th at 266-67. The Court rejected the defamers' contention that the plaintiff, a photojournalist covering Robert Kennedy's candidacy for the Presidency, had injected himself into a public controversy regarding Kennedy's assassination by standing next to him on the podium when he was killed. 19 Cal. 4th at 260, 266-67. While Khawar had participated in a controversy over Kennedy's candidacy, the *relevant* controversy was Kennedy's assassination, occurring moments later. 19 Cal. 4th at 266-67.

Decisions such as the one in this case that consider prior unrelated conduct in determining limited purpose public figure status negate the *Gertz* distinction between all-purpose and limited purpose public figures, improperly subjecting "all aspects" of a limited purpose public figure's life into the public figure inquiry. *Gertz*, 418 U.S. at 352.

The holdings by the District of Columbia Circuit directly conflict with this Court's careful attempt to limit the public figure classification to those who are either all-purpose public figures, or those who have thrust themselves to the forefront of a particular controversy. *Gertz*, 418 U.S. at 345, 352.

CONCLUSION

In the three decades since this Court created the limited purpose public figure in *Gertz*, the classification has affected thousands of cases in every jurisdiction. American Law Reports devotes more than 350 pages to the question of "Who is 'Public Figure' for Purposes of Defamation

Action," Tracy A. Bateman, Annotation, 19 ALR 5th 1, 1-350 (1994), ALR 5th; ALR 5th Supplement 3-23 (2004).

Due to the often insurmountable difficulties of meeting the *New York Times* burden of knowing or reckless falsity, the classification often dooms any prospect of recovery, even for "deserving plaintiffs, including some intentionally subjected to injury." *Gertz*, 418 U.S. at 342.

In spite of the huge volume of cases reaching the courts since *Gertz*, the limited purpose public figure classification remains elusive and complex, confounding the lower courts. The sheer volume of cases reflects the turbulence and confusion over these issues in the courts below. As in this case, the courts typically engage in an *ad hoc* analysis that defeats this Court's call for "broad rules of general application," and results in contradictory and unpredictable outcomes. *Gertz*, 418 U.S. at 342.

As this case and the above examples show, the lower courts are in disarray on most elements to be decided in resolving the public figure issue. In this case, a court classified an individual as a limited purpose public figure even though there was no public controversy, there was no public conduct intended to affect the outcome of the controversy, and there was no connection between the defamatory speech and any controversy.

Only this Court can clarify these issues for lower courts throughout the country by finally ending its quarter-century of silence and providing critical guidance to the courts and to potential litigants.

For all the above reasons, a writ of certiorari should issue to the Court of Appeal of California, First Appellate District.

Respectfully submitted,

PAUL RICHARD KLEVEN
Counsel for Petitioner
1604 Solano Avenue
Berkeley, California 94707
(510) 528-7347

APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

MARY MILES,
Plaintiff and Appellant

v.

SIERRA CLUB et al.,
Defendants and Respondents

No. A101437
(San Francisco County
Super. Ct. No. 311109)

April 20, 2005, Decided

Consistent with a jury's special verdict, the trial court entered judgment for respondents Sierra Club, Ron Guenther and Roanne Withers on appellant Mary Miles's defamation action. Miles's motion for a new trial was denied. She appeals from the judgment [1] and the order

[1] Miles filed a timely notice of appeal from the October 24, 2002 judgment. She filed a timely notice of intent to move for new trial on November 8, 2002. (See Code Civ. Proc., § 659, subd. 2.) The trial court denied the motion for new trial by minute order on December 20, 2002—within the 60-day period for ruling on motions for new trial—but did not file its formal denial order until January 29, 2003, after the 60-day period had run. Miles's January 17, 2003 notice of appeal was filed within 30 days of the denial of the motion for new trial by operation of law. (See Code Civ. Proc., § 660.) Thus, the notice of appeal from the judgment is timely. (See Cal. Rules of Court, rules 2(a)(1), 3(a)(2).

denying her motion for new trial on damages,[2] contending that the trial court erred by concluding that she was a limited purpose public figure, thus requiring her to prove actual malice in order to recover damages. In the alternative, Miles contends that even if she was a limited purpose public figure, the special verdict question on actual malice was ambiguous about how jurors were to evaluate 24 allegedly false and defamatory statements. We affirm the judgment.

I. FACTS

A. *The Parties*

Respondent Sierra Club is a national nonprofit public benefit corporation based in San Francisco. Its board of directors makes policy for its 750,000 members which Carl Pope—as its executive director—implements. The national organization is divided into regional chapters which may sometimes be further divided into groups. [3] During the years relevant to the underlying lawsuit, the national organization required chapters to issue a newsletter and maintain certain records, but did not require groups to do so. [4]

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[2] An order denying a motion for new trial is not independently appealable, but it may be reviewed on Miles's appeal from the judgment. (See *Leaf v. City of San Mateo* (1984) 150 Cal.App.3d 1184, 1187, fn. 2, disapproved on other grounds in *Trope v. Katz* (1995) 11 Cal.4th 274, 292; see Code Civ. Proc., § 904.1, subd. (a)(4) [order granting new trial is appealable].) In her appeal, Miles does not appear to raise any issues that specifically pertain to the trial court's denial of her motion for new trial, but she seeks a new trial on the issue of damages as a result of her challenge to the judgment.

[3] In 2002, the Sierra Club had approximately 430 groups.

[4] Since the filing of this action, the Sierra Club has established more rigorous minimum group standards.

The Redwood Chapter—serving Mendocino and Lake County members—is based in Santa Rosa. At all relevant times, the chapter—chaired by Marianne de Sobrino—was divided into several subgroups. One of them—the Mendocino/Lake Group—included members from both Mendocino and Lake counties. [5] The group was based in Fort Bragg on the Mendocino coast, although some Sierra Club Mendocino/Lake Group members resided inland, closer to Ukiah.

Respondents Ron Guenther and Roanne Withers lived in Fort Bragg and were local conservation activists of many years' standing. They were active in the local Sierra Club group. They were members of the Mendocino/Lake Group's executive committee, which governed how the group spent the $2,000 annual budget it received from the national organization. In the 1990's, Guenther chaired the group and Withers served as its secretary. The executive committee tended to be populated by older volunteers who served for many years. Their volunteer work protecting the environment was viewed as essential, but group recordkeeping was somewhat informal.

On the personal side, Guenther and Withers shared a home and had a child. Guenther was in his early 60's, had long suffered from Parkinson's disease, and displayed some early signs of senile dementia. He had been working on environmental issues for 25 to 30 years. Since he had become disabled 20 years earlier, he worked as a Sierra Club volunteer. He served as a mentor to other local environmentalists. He was one of the most

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[5] By the time of trial in 2002, the Mendocino/Lake Group had been divided into two groups, one of which was the Mendocino Group with which Guenther remained affiliated. A separate Lake Group of about 300 members had been formed to represent inland area interests.

respected environmentalists in Mendocino County—an area characterized by one observer as a "hot bed of environmental activity and contention." His experience and the clout of the Sierra Club—a highly influential national environmental organization—made him an important ally for other local environmental groups. Local environmental groups cooperated with one another, often sharing information in order to achieve common goals.

Withers was also connected to the local journalistic community. Beginning in the mid-1990's, she submitted occasional columns and articles for the Anderson Valley Advertiser, a weekly Mendocino County newspaper with a circulation of approximately 4,500. The paper—owned and published by Bruce Anderson—was published in Boonville. He paid Withers a nominal fee for her submissions. The publisher was a highly independent person who did much as he pleased, both in his personal life and in the Anderson Valley Advertiser. At times relevant to the underlying action, he was also a member of the Sierra Club, heading two committees in the Mendocino/Lake Group. His brother Rob Anderson wrote a weekly column of commentary for the newspaper.

Rob Anderson was a friend of appellant Mary Miles. Miles was a longtime contributor to the Anderson Valley Advertiser, which published her cartoons anonymously under the pseudonym "M." She drew these cartoons for at least 10 years, from 1986 until 1996. In 1992, she self-published a collection of cartoons that had been published in the Anderson Valley Advertiser. Consistent with the tone of the Anderson Valley Advertiser, her cartoons were highly critical of local and national figures. Miles expressed her displeasure with her targets in a pictorial manner that was often vivid and jarring. She characterized a Nobel Prize winner as a "butthole surfer"; depicted an environmental reporter for a rival newspaper as a drunken liar; and portrayed five

justices of the United States Supreme Court as "straining penises."

Her highly charged cartoons prompted much curiosity among the public about the identity of the cartoonist "M." Miles believed that few people other than Bruce Anderson—who signed a 1995 anonymity agreement to protect her identity—knew that she was the anonymous cartoonist. However, many people—including many of her targets—said that they knew that "M" was Miles. Bruce Anderson concluded that the secret identity of "M" was actually well known during the 10-year period that Miles submitted her cartoons for publication in his newspaper. Miles herself knew that Withers was aware that she was "M."

Mary Miles was also a member of the Sierra Club. As a result of her Calpella residence near Ukiah, she was a member of the Mendocino/Lake Group. Her name was not on the local group roster that Guenther and Withers maintained, but the national office listed her as a Sierra Club member. Miles also belonged to a number of other environmental organizations. She volunteered for various environmental organizations in the Mendocino area, sometimes offering public comments on environmental issues.

B. *The Mileck Dump Project*

In the spring of 1998, the Cole Creek Compost Facility—known colloquially as the Mileck dump—became a hotly contested local issue. In May 1998, the Mendocino County Board of Supervisors conducted a public hearing to consider whether to approve an environmental impact report (EIR) and permit the dump to continue operations. Earlier, the Mendocino Environmental Center and some neighbors had taken legal action in this matter. The EIR that was then under review was ordered to be prepared as a result of that lawsuit. Before the public hearing, Miles telephoned Withers

several times about the EIR. These calls went on for hours, but Withers was used to receiving requests for advice in similar matters. Withers answered Miles's questions about the legal requirements of the EIR, but Miles did not seem happy with her answers. Withers tried to help, but considered Miles's apparent goal of shutting down a facility that had already been in operation for several years to be unreasonable. Miles also seemed to Withers to be unusually interested in minor matters at the expense of larger issues.

During their calls, Miles had complained to Withers about other local environmentalists whom she claimed were corrupt and were conspiring to exclude her from whatever she wanted to be involved in. When Withers studied the county file on the project, she saw that the Mendocino Environmental Center and many individuals had commented on it.

Withers went to a meeting of neighbors opposing the dump. At this meeting, she first met Miles. Withers noticed that the neighbors did not speak to Miles or acknowledge her. When she and Miles spoke in person, Withers felt uneasy when Miles stood too close to her. Withers felt intimidated when she stepped back a bit and Miles followed her. Her observations of Miles led her to conclude that the other woman only pretended to have environmental concerns, but that she was mostly concerned about the impact of the Mileck dump on the view from her property.

Miles appeared at the public hearing and spoke in opposition to the Mileck dump EIR. She gave her name as "Mary Goodwin." She submitted voluminous documents—perhaps a stack as much as two feet tall—into the record. Withers also attended the public hearing and participated in it. She did not oppose the project on behalf of the Sierra Club as Miles wanted her to do. However, some of Withers's comments prompted the county to adopt a mitigation monitoring plan.

The outcome of the hearing did not satisfy Miles. Withers recommended two environmental lawyers to Miles who might handle a case related to this matter. After the hearing, Withers twice spoke with Miles by telephone. In the last telephone call, Miles became angry, screaming at her in a bizarre manner. This frightened Withers, who asked Miles not to call her again and hung up the telephone.

Miles believed that Withers sabotaged her efforts on the Mileck dump issue. She told her friend Rob Anderson about the public hearing on the EIR. In July 1998, he wrote a column in the Anderson Valley Advertiser, asking what position the Sierra Club was taking on the Mileck dump controversy. In it, he suggested that the Sierra Club was not doing its job because it was a latecomer to the issue. He also reported that Miles felt sabotaged by Withers, and noted that Miles had been ejected from the neighborhood opposition group. Some viewed the article as highly critical of Withers.

Withers found the column to be inaccurate and tiresome. Apparently, Bruce Anderson was also less than pleased with his brother's column, because he immediately invited Withers to respond to it. Her reply was published on July 22, 1998. In "Roanne Replies," Withers summarized her final telephone conversation with Miles, whom she characterized as "frightening." Some of the statements Withers made were complimentary to Miles, but other comments offended Miles.

In addition to Withers's response, Bruce Anderson published his own criticism of Rob Anderson's earlier column. In it, he criticized Miles—in her "Mary Goodwin" alter ego—challenging her for telling "constant lies" about a Mendocino environmental lawyer who had been hired to represent a group of neighborhood opponents to the Mileck dump. He also suggested in a

sidebar article that Miles harbored personal hostility toward Withers and the Sierra Club.

C. *Miles's Complaints about Mendocino/Lake Group*

Within days of the July 1998 criticism of Mary Goodwin in the Anderson Valley Advertiser, Miles began to focus her attention on how the Mendocino/Lake Group was being run. The Mendocino/Lake Group did not have a nominating committee for all its elections, choosing to operate in a less formal manner. The group did not have a formal nominating committee because they never had enough people to serve on the nine-member executive committee. Instead, anyone who wanted to run could usually do so. Ballots for positions on the executive committee ballots were distributed by the chapter, which ran the group elections on a yearly basis. It may have been more consistent with Sierra Club policy for each local group to have a nominating committee to find persons willing to serve on the group's executive committee. It was unclear whether the Mendocino/Lake Group's less formal practice was permissible or improper under Sierra Club rules, according to Executive Director Carl Pope. If the practice was improper, it was an honest, technical error.

As Miles later explained it, she wanted to get involved with the Mendocino/Lake Group of the Sierra Club, but was unable to find out where its meetings were held. Meeting notices were published in the chapter newsletter, the Redwood Needles, and in two Mendocino and Fort Bragg newspapers, but Miles did not find them. Frustrated, she decided to challenge the local group's manner of selecting nominees for its executive committee. She concluded that the elections for the executive committee were not democratically run, denying a person like herself an opportunity to attend meetings or participate in the group in a meaningful way. She sought to reform the group by forcing open nominations and

elections to the executive committee, having open meetings, and doing proper record keeping.

Miles tried to make changes in the Mendocino/Lake Group through the chapter. Two weeks after two local Sierra Club group members criticized her in print, Miles wrote the first of a series of letters to the chair of the Redwood Chapter—who was Marianne de Sobrino—complaining about Mendocino/Lake Group practices. In her August 1, 1998 letter, she complained that she had never received a ballot for the Mendocino/Lake Group elections. She began to attend chapter meetings, taking voluminous notes but not actually participating in the discussion of any conservation issues.

Miles also became concerned about whether the local group was sufficiently interested in issues of significance to more inland members such as she. The Mendocino/Lake Group's bylaws provided that the group was based in Ukiah, but its meetings were actually held in Fort Bragg. She believed that this made it difficult for inland resident Sierra Club members to attend a meeting held perhaps a two-hour drive away from Ukiah. As the group was based on the coast, she concluded that they focused almost exclusively on coastal issues.

Miles contacted the Redwood Chapter to find out how to form an inland area group within the Mendocino/Lake area. She was advised to form a committee of members to demonstrate interest in a new group. She asked for the chapter's membership list to locate other inland area members who might be interested, but her request was refused. [6] Miles concluded that she

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[6] Pope later testified that the Sierra Club did not give out its mailing list, although certain people were entitled to mail items to the persons on their list at their own expense, through a mailing house.

was being "stonewalled" by chapter officials who only pretended to be interested in her ideas while actually trying to make it impossible to achieve her goals.

Miles contacted the chapter again, this time to see how a person could be nominated to serve on its Mendocino/Lake Group's executive committee. She later explained that this was a general inquiry—she did not seek nomination herself. Margaret Pennington—the chair of the chapter's nominations committee—told Miles that 10 percent of 10,000 local members could petition for her nomination. Again, Miles felt that her efforts were frustrated by her inability to obtain the local group membership list.

Miles wrote to de Sobrino again on November 15, 1998, complaining that the Mendocino/Lake Group was not conducting proper elections. She asked that upcoming Mendocino/Lake Group executive committee's elections be called off. On November 25, 1998, de Sobrino acknowledged the lack of nominating process, but she declined to postpone the group's executive committee election. Instead, she opted to work with the existing executive committee to make the elections more democratic in the next election cycle. The group's executive committee election was conducted, with the same people being elected.

One of de Sobrino's suggestions had been to consider forming an inland group, so Miles renewed her efforts on this front. She wrote again to Marianne de Sobrino, the Redwood Chapter chair. Pennington responded to this letter by telephone, again refusing to turn over the membership list. Miles asked for the zip codes of areas within the Mendocino/Lake Group where Sierra Club members lived who might be interested in participating in an inland area group. Miles later claimed that she sent this information along, but received no response.

Miles sent a more formal complaint about the group's executive committee election to de Sobrino on December 21, 1998, following grievance procedures that she had obtained from the national organization. [7] She asked that the group's recently elected executive committee be unseated and that the election be nullified. [8] In this letter, she also complained to de Sobrino that Withers had libeled her in the Sierra Club's name when she wrote her July 22, 1998 "Roanne Replies" article in the Anderson Valley Advertiser.

Over the course of five months, the local group only heard about Miles's efforts in informal communications from chapter sources. Miles had not sent copies of any of her chapter correspondence to the Mendocino/Lake Group. Withers and Guenther heard that she was trying to oust executive committee members, but did not take her concerns seriously. Toward the end of 1998, Guenther learned that Miles had contacted the Redwood Chapter and sought to have the group's executive committee removed from office. Guenther was concerned that if the dedicated volunteers of many years of experience in conservation were removed from the executive committee, there would be no governance of the group at all.

About this time, de Sobrino contacted Guenther by email and asked him a series of questions based on those Miles had posed to her. Guenther explained the group's situation in a long letter. In her February 9, 1999 [9] reply

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[7] The Mendocino/Lake Group's executive committee election was conducted by the Redwood Chapter.

[8] Pope later opined that banning one or all of the group's executive committee members for lack of a formal nominating committee would be an inappropriate sanction for such an honest, technical error.

[9] All subsequent date references are to the 1999 calendar year, unless otherwise indicated.

to Miles, de Sobrino again acknowledged certain issues with the group's practices, but advised her that the chapter would take no action on her complaint. She advised Miles how to take her complaint to the national organization, giving her specific instructions about how to file a written complaint. De Sobrino recommended that Miles substantiate any complaint she might make with minutes, bylaws, newsletters and other documents from the chapter and the group.

Miles contacted a member of the national organization's committee on standing rules [10] and bylaws. She was told what particular information to include in the complaint which was to be sent to her contact there. She consulted the state Corporations Code and the national organization's bylaws. She concluded that these sources required the Mendocino/Lake Group to announce meetings, hold regular meetings, conduct nominations in a certain manner, hold elections properly and keep records. As a Sierra Club member, she concluded that she was entitled to see the group's records. On March 1, she wrote to Carl Pope, seeking the chapter's membership list and other documents.

On March 10, Miles wrote her first letter directed to the Mendocino/Lake Group. Identifying herself as a Sierra Club member, Miles asked the chair for copies of all of the group's minutes, treasurer's reports and newsletters or other member communications made during the past 10 years. She asked for information about meeting times and locations, meeting announcements, and the names of all those present at each meeting held during that 10-year period. Finally, she sought a copy of the group's bylaws, including any amendments since 1987. Miles concluded her letter by stating that if she did not

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[10] The Sierra Club's standing rules are resolutions of its board of directors governing the ongoing processes of the organization.

receive these items within 10 days, she would deem her request to be denied. She assumed that all of these records were readily available at the group's office. [11] She intended to use this information to support her complaint to the national organization. They were documents she needed in order to follow the instructions that the national organization and the chapter had given her. However, she did not explain her purpose in her letter, which was little more than a list of the documents she sought.

Guenther received Miles's letter. On March 16, he sent Miles a letter on Sierra Club letterhead formally denying her request. He explained that he found no national, chapter or group authority to support her request. He noted that the group he chaired was "small, under-staffed, and under-funded."

On March 22, Miles formally appealed Guenther's decision by letter to Carl Pope at the national office. In her letter, she opined that chapter and group officials were deliberately obstructing her attempts to obtain information that she was legally entitled to receive. Pope concluded that under California law, Miles was entitled to see at least some of the documents she sought. Pope's goal was to protect the confidentiality of the Sierra Club's mailing list. In order to do so, he would allow her to communicate with list members through a mailing house rather than handing the list over to her. [12] He feared that if Miles was not allowed access to some of the

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[11] In contrast, Pope doubted that local groups actually kept the sort of records that Miles wanted for the time period that her request specified.

[12] Pope later testified that when Miles was offered this alternative, she was dissatisfied with it, insisting that she should have access to the actual mailing list.

information she sought to which he thought she was legally entitled, he might have to actually reveal the Sierra Club's mailing list to her, thus giving up valuable proprietary information. At his direction, Pope's assistant instructed Guenther to give Miles what she asked for. Guenther was told that he had two days—not 10—within which to do so.

D. *Inquiries Leading to March 31 Letter*

After they received Miles's March 10 demand for group records, Guenther and Withers began taking her more seriously. Withers contacted other group members, many of whom were involved in other regional conservation groups. Several of them talked with Withers, who then passed the information about Miles along to Guenther. David and Ellen Drell [13] of the Willits Environmental Center and Linda McClure of Ukiah's Mendocino Environmental Center reported having had similar difficulties with Miles in the past when Miles reviewed their group records. Withers also spoke with Bruce Anderson, her publisher at the Anderson Valley Advertiser and another Mendocino/Lake Group member—as well as a second local newspaper publisher.

Mark Heimann—another writer for the Anderson Valley Advertiser and a friend of Miles—was also one of Withers's sources. She had gotten to know him when they wrote a series of arson articles together for the Anderson Valley Advertiser. She believed that Heimann knew Miles well, because he had told Withers that he was in business with Miles along with Sara Jacobelli—who later married Heimann—and Bruce Anderson's brother

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[13] Two witnesses testified that Miles believed that the Drells and others on their staff were "out to get her." David Drell testified that Miles held a similar view about those working at the Mendocino Environmental Center. He disputed the accusation Miles leveled against his organization.

Rob Anderson. [14] Heimann told Withers that Miles had been institutionalized in the past and that she was on the verge of a serious breakdown again. Her friends were really worried about her, he told her. They were considering having her institutionalized again. [15]

Withers believed what Heimann told her. This information was consistent with her own sense—acquired during and after the Mileck dump hearing—that Miles was frightening. She felt that Miles was physically dangerous. The information Withers received from people she spoke with during this time confirmed her suspicions that Miles was paranoid. Withers and Guenther knew that Miles was the cartoonist "M" and that she sometimes used the name "Mary Goodwin." Her "M" cartoons were disturbing to them—they seemed violent and frightening—leading them to believe that Miles was dangerous.

Guenther and Withers believed that Miles's demands were irrational and bizarre—that she asked for these documents to harass the local group and the national Sierra Club. Group members felt it would be difficult if not impossible to assemble all the requested records in the time allowed. Guenther was also rankled because Miles had not offered any reason why she wanted copies of these documents. He feared that giving Miles what she asked for would simply lead to more demands.

In response to the instructions she and Guenther received from Pope, Withers drafted a complaint letter to Pope on Sierra Club letterhead. Guenther added an introductory paragraph, and—in his capacity as chair of

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[14] Both Miles and Heimann denied having been in an ongoing business together.

[15] When Heimann testified, he told the jury that *she* had told *him* this information. (See pt. II.F., *post*.)

the Mendocino/Lake Group—signed the letter. Guenther trusted the information that Withers had gathered about Miles. Withers was a very thorough person and an excellent source of good information, in Guenther's judgment.

In the letter, Guenther and Withers stated that they were unable to find Mary Miles's name in their group membership records. She had been invited to attend meetings, but had not done so.[16] They had learned that Miles had made similar, disruptive efforts to obtain records from other regional environmental groups. Some of the people they spoke with at other regional groups concluded that Miles irrationally believed that they were out to get her. Some concluded that she had no real interest in conservation.

The letter went on to characterize Miles's request for documents as harassment and complained about Pope's instructions to deliver copies of 10 years of records on short notice to someone who did not appear to be a Sierra Club member and who did not even explain why she wanted them. Guenther told Pope of his fear that the time required of group volunteers to gather scattered records and comply with Pope's instructions would prompt key group members to resign. His letter expressed the concern that Miles was paranoid, was on a fishing expedition, and was both frightening and dangerous. He recommended using caution when dealing with her. He suggested that Miles attend the May 1 group meeting, noting that a police officer might be present in case she became disruptive.

On March 31, the letter was sent to Pope at the Sierra Club's national headquarters. In her capacity as

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16 Although Miles initially testified that no one had invited her to attend a Mendocino/Lake Group m meeting, she later acknowledged that she had been informed of such a meeting but did not attend it.

group secretary, Withers sent copies of the letter to various group members who had talked with her about Miles, those whom Miles had identified to Withers as people she intended to investigate for corruption, and other Sierra Club chapter and group members. Many of these group members headed other regional conservation groups with which the Mendocino/Lake Group of the Sierra Club cooperated. A copy of the letter was sent to Bruce Anderson of the Anderson Valley Advertiser [17] and the editor of another local newspaper. [18]

She and Guenther later explained that they intended the letter as a protest against Pope's instructions and as a warning to other regional conservation groups about what Miles was doing. They viewed Miles's conduct as an issue of common concern in the local environmental community and thought everyone should be alerted about what Miles was planning to do.

E. *Aftermath of March 31 Letter*

Although Guenther and Withers did not find her name on their local roster, Pope advised them that the national office listed Miles as a Sierra Club member. On April 5, Pope sent Guenther and Withers a letter to this effect, again instructing them to produce the documents that Miles sought. In this letter, Pope offered to accept the documents at the national headquarters and allow Miles access to them there.

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17 The letter states that a copy of it was sent to Bruce Anderson as an "[i]nterested member" of the Mendocino/Lake Group. It also refers to him as the editor and publisher of the Anderson Valley Advertiser.

18 Withers testified that she did not know whether she actually mailed copies to all the persons listed at the end of the letter or whether anyone received the letters if she did mail them. Some of the several listed recipients actually received a copy of the letter and some did not.

Meanwhile, Withers had a brief conversation with Bruce Anderson about his receipt of the March 31 letter to Pope shortly after it went out. That letter prompted Bruce Anderson to write and publish his "Off the Top" column about it in the Anderson Valley Advertiser on April 7. In this column, he denounced Miles as a crazy person who was harassing hardworking, long-time volunteer leaders of the local Sierra Club group. He reported that Miles had been "tossed out" of the group opposing the Mileck dump project because its members did not want to listen to her "monologues on why she is right and everybody else is wrong." He questioned her reasons for seeking 10 years of Mendocino/Lake Group records, in part because he reported that she was not a member of the Sierra Club and had never attended a meeting of the local group. He also reported that after Pope ordered the group to give her the documents she sought, Guenther challenged this order in a letter, prompting Pope to "back[] off." Finally, Bruce Anderson wrote that two older, long-time members of the group had quit rather than fight "nut cases" like Miles.

Miles had not seen the March 31 letter, but she sensed that something was afoot when she read the column in the Anderson Valley Advertiser describing her request to the Sierra Club. The column shocked her. She wondered how the publisher had learned of her request to the Sierra Club, not knowing that the Anderson Valley Advertiser publisher was active in the local group. On April 8, Miles sent a letter to Pope, continuing to negotiate with him about how and when she would view the Mendocino/Lake Group documents that he had told her would be made available to her.

For his part, Pope was unhappy that the fact of an internal conflict within the local Sierra Club group had been leaked to the press. On April 9, he mailed a letter to the editor of the Anderson Valley Advertiser, sending a copy to Miles. Pope concluded that Miles was a Sierra Club member and, as such, was entitled to access to group

minutes. He also criticized the publisher for unfairly attacking Miles and for airing an internal Sierra Club matter in public.

With Miles's copy of this letter, Pope also enclosed a letter to Miles, apologizing for the Sierra Club's "inadvertent role" in the April 7 attack published by the Anderson Valley Advertiser. He identified the publisher as a member of the Sierra Club who used group correspondence in an improper manner to form the basis of this attack. On April 12, Miles sent a letter to the Redwood Chapter, seeking copies of its financial records.

Pope's letter to the editor appeared the next week in the April 14 edition of the Anderson Valley Advertiser. Another article critical of Miles was also published in response to his letter. On April 27, Miles went to Pope's office in San Francisco to obtain the promised records. Pope was not there, but she was given copies of 36 pages of minutes, correspondence and a copy of her complaint to de Sobrino. One letter in the file was Pope's April 5 letter to Guenther suggesting that the records Miles sought be sent to the national headquarters, where Sierra Club officials could take "security precautions." The file did not include a copy of the March 31 letter from Guenther to Pope, which he had received by then. Not all of the documents found in this file satisfied Miles. On April 28—the day after her visit to the Sierra Club headquarters—she sent a letter to Pope, setting May 8 as a deadline for full compliance with her demand for remaining documents.

On May 3, Miles wrote yet another letter to Pope, complaining about the April 7 Anderson Valley Advertiser column. She believed that the Sierra Club was behind the attack. Miles demanded that Pope retract 25 specific statements contained in the April 7 newspaper column or in other documents in the files that she obtained from the national organization headquarters. Pope's May 4 reply noted that he had already sent a letter

critical of the column to the Anderson Valley Advertiser, which had been published on April 14. He noted that most of the 25 statements that Miles cited came from the Anderson Valley Advertiser, not from him. He also stated that several of these statements had already been rebutted in his letter to the editor, were not directed toward her in particular, or were not defamatory to her. He disassociated himself from the newspaper and told Miles that he had no power to retract statements made in it. To the extent that anyone could find that they were directed at Miles, Pope retracted them, stating that he had no basis for concluding that she had done anything inappropriate, dangerous or annoying.

On May 7, Pope sent another letter to Miles, explaining that the files she reviewed in his office may not have been all of the Sierra Club files that contained any reference to her. Miles sent another letter to the chapter on May 10, apparently continuing to pursue her appeal.

On May 14, Miles first saw Guenther's March 31 letter to Pope. It came to her from an unidentified, anonymous person. She was shocked, outraged, hurt, and depressed when she read it. A friend noted that the letter implied that Miles was a dangerous person who might have to be restrained by police. Miles felt that her reputation had been destroyed. She believed that she had been libeled by the letter, which had been distributed to several people, including Bruce Anderson.

After she saw the March 31 letter, Miles abandoned efforts to pursue her appeal. By summer, she had been accepted into law school and had moved to San Francisco.

Other events continued to unfold in the Mendocino and Lake County area. Mark Heimann had asked Withers to testify that Bruce Anderson had agreed to give him a bonus for the series of arson articles he had helped to write in the fall of 1997. Heimann and Jacobelli believed

that Bruce Anderson owed them a $2,200 bonus for their part in the arson articles. When he refused to pay, they sued him in small claims court. Withers refused to testify, as she knew nothing of an offer of a bonus to Heimann. She suspected that there was no such offer, as she and Bruce Anderson did most of the work on the article. Withers later stated that Heimann interviewed a few people, but did no actual writing on the articles that had been published in the Anderson Valley Advertiser in January and February 1998. Over the course of several weeks, Heimann repeatedly pressured Withers to testify, without success. Ultimately, Heimann and Jacobelli lost their lawsuit.

After the small claims dispute was resolved, Heimann threatened Bruce Anderson, leading a court to issue a temporary restraining order against him. This was not Heimann's first restraining order—several newspaper articles had been published about three or four restraining orders against Heimann stemming from domestic disputes. In one instance, Heimann had reportedly taken an axe to his former girlfriend's car. He carried a .38-caliber pistol that he strapped to his ankle, carried a gun in the glove box of his car, and claimed that he had filed off the weapon's serial numbers so that it could not be traced. On August 18, Withers wrote an article for the Anderson Valley Advertiser about the incident, characterizing Heimann's request as an invitation to commit perjury. [19]

F. *Lawsuit and Trial*

On March 29, 2000, Miles filed her original complaint in the underlying action. Five days later, she

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[19] Heimann and Sara Jacobelli denied that Withers was asked to offer false testimony in their case. Heimann did not seek a retraction of the August 18 article.

filed her first amended complaint for damages, alleging causes of action for defamation, intentional and negligent infliction of emotional distress, and willful misconduct. The Sierra Club and Ron Guenther were named as defendants. The complaint alleged that the March 31 letter contained false and libelous statements that were made with actual malice. Miles sought both compensatory and punitive damages. Sierra Club and Guenther answered the first amended complaint.

Withers discussed Miles's lawsuit with Bruce Anderson very briefly after it was filed in March 2000. After Anderson was subpoenaed and deposed, the Anderson Valley Advertiser reported that Miles had filed her lawsuit. This report came on October 4, 2000—seven months after the lawsuit was first filed. Bruce Anderson titled his article "Crazy Mary versus Sierra Club." It detailed much of what he knew of Miles, including her business and certain incidents he had observed. Bruce Anderson characterized Miles as "a cunning nut." He implied that the Sierra Club was justified in its judgment that she was psychotic. In this report, he also printed the March 31 letter and disclosed Miles's identity as the cartoonist "M."

This appears to be the first time that the full text of the March 31 letter was widely published. Guenther was shocked that Bruce Anderson published what he viewed as a private letter in the newspaper, but as it became a matter of public record after Miles filed her lawsuit, he supposed that Anderson had a right to publish it.

Miles believed that the October 4, 2000 article was a republication of the Sierra Club's March 31 libel against her. She regarded the disclosure that she was the cartoonist "M" as a breach of Bruce Anderson's confidentiality agreement with her. In her view, many of the incidents referred to in the article were fictionalized or embellished. However, she did not ask Bruce Anderson

to retract the statements made in this article, nor did she sue him or his newspaper for defamation.

In October 2001, Miles filed a supplemental complaint, adding Roanne Withers as a defendant and alleging that Miles was defamed again when the Anderson Valley Advertiser published Guenther's March 31 letter in its report of her lawsuit. In November 2001, Withers answered the first amended complaint and all three defendants answered the allegations of the supplemental complaint.

Before trial, Miles filed a discovery motion seeking records going back to 1989. The trial court ruled that her request for discovery was overbroad and burdensome. Accordingly, it sustained an objection to that request for production of documents. It also bifurcated the liability and punitive damages phases of the trial.

The liability phase was tried in 2002 before a jury. Miles testified over the course of five days. She identified 24 statements that she found to be defamatory in Guenther's four-page letter. She depicted her actions toward the Sierra Club and the Mendocino/Lake Group as a benign attempt to introduce democratic reforms and to form an inland group that would be more responsive to inland area issues. She had not intended to make these concerns a public matter.

Miles disputed specific statements in the March 31 letter. She had never been institutionalized or convicted of any crime. She had never been diagnosed as having a serious mental problem. She expressed bewilderment about why anyone would suggest that she was dangerous or annoying. She had done nothing more than request information that she had a right to have. Miles believed that Guenther and Withers intended to hurt her by the March 31 letter, which she believed was "filled with hate." She was also critical of the defense claim that Bruce Anderson was sent a copy of the March 31 letter

because he was active in the Mendocino/Lake Group committee. She viewed the Anderson Valley Advertiser as an official communications arm of the Sierra Club.

Miles told the jury that no one had ever complained to Miles that her "M" cartoons were disturbing. She denied that she ever advocated violence, even in her cartoons. Her cartoons were aggressive or contemptuous of those persons—including some judges—depicted in them, but were merely illustrations intended to accompany news articles. Many of these cartoons were admitted into evidence, over Miles's objections.

At the time of trial, Miles was a student at Hastings College of the Law in San Francisco. She had hoped to be an environmental lawyer, but those hopes were dampened after the March 31 letter. She told the jury that one defense attorney—himself a member and officer of the Sierra Club—was actively trying to damage her ability to obtain employment in this field of law. [20]

Guenther and Withers testified in their own defense, both denying that they felt any anger toward Miles. They regarded her request as a nonproductive distraction from their substantive environmental work. Miles's request posed a problem that Guenther had to

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[20] The defense put on evidence suggesting that Miles's conduct—not theirs—made it unlikely that she would find work as an environmental lawyer. A Sierra Club attorney responsible for hiring environmental lawyers testified that the organization was unlikely to work with an attorney who had caused problems within a chapter or a group or in another environmental group with which the club worked. Often, attorneys hired to assist the Sierra Club on local issues were recommended by members of a local group, who would be unlikely to recommend someone who had created difficulties within that group. Having looked at some of the cartoons that Miles—as "M"—drew about judges and court, he also had doubts about her degree of professionalism. In his judgment, she lacked the requisite respect for the court system. He concluded that it was unlikely that Miles would even be interviewed for a Sierra Club position.

solve. Withers simply wanted her to go away. The letter was intended to be a private communication. It summarized information that Withers collected from persons Guenther trusted—information that, at trial, Guenther continued to believe was accurate. [21]

Guenther and Withers believed that the group was a democratic one and denied trying to exclude people from the executive committee. [22] Guenther had a long practice of mentoring others who wanted to join the work of protecting the environment. She felt that Miles's charge that the Mendocino/Lake Group had ignored inland issues was unfair, offering evidence of many inland issues that the group had worked on during a 10-year period. She also cited the joint efforts of the Mendocino/Lake Group with other local environmental groups other inland issues.

Bruce Anderson was a key witness for the defense. He testified that he first met Miles in 1986, when she was introduced to him as a cartoonist. She told him that she had been a postal worker, but that she was "purged" from the postal service because of union organizing activity. She told him that she had filed a stress claim with the postal service.

Miles was an unhappy person and a difficult employee, Bruce Anderson told the jury. Over a 10-year period, he listened to her complain often and at length about what he characterized as "the imagined slights" of others. She seemed to him to be obsessed, believing that

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21 A local environmental activist testified that the comments about Miles in the March 31 letter he received were "not inconsistent" with his own opinion that she was paranoid, which he based on his personal knowledge of her conduct.

22 Withers admitted that she once expressed her hope that Miles would not run for a seat on the executive committee of her group.

other people had insulted or humiliated her. Miles became angry with him after a paragraph in one of her articles was reprinted out of order. She demanded that he reprint the article, but he refused to do so because he thought the mistake was a minor one that did not make the article incomprehensible. After this incident, Miles "faded away" from the Anderson Valley Advertiser.

Bruce Anderson also knew Guenther. The two men first met in 1984. He viewed the functioning and effectiveness of conservation organizations such as the local Sierra Club group as newsworthy in the contentious North Coast area in which his newspaper circulated. In his view, if Guenther, Withers or other members of the executive committee of the Mendocino/Lake Group ceased doing environmental work in the area because of Miles's lawsuit, her lawsuit was newsworthy. He believed that the March 31 letter was newsworthy because a private letter—one that Anderson characterized as inoffensive and factual—had prompted a lawsuit requiring both a deposition and a trial. He offered similar opinions about the propriety of Miles's lawsuit in the article.

Anderson testified that neither Guenther nor Withers asked him to print the March 31 letter or told him anything that he wrote in the October 2000 article. Guenther and Withers reiterated this in their own testimony. He observed that Miles never challenged him about the truth of any of the statements he made in his October 2000 article and disputed her trial testimony that some of the events reported in it were fabricated. Anderson also denied that he ever published articles at the request of the Sierra Club other than the April letter to the editor that Pope had sent criticizing his April 7 column.

Miles offered the testimony of Heimann and Jacobelli in support of her defamation claim. They told the jury that Withers had asked them about Miles. Withers told them that Miles had been harassing her,

Guenther and the Sierra Club. She wondered if Miles was really an environmentalist. Jacobelli and Heimann told Withers that Miles was an environmental activist who fought timber harvesting plans. Withers told them that Miles was stalking her and that she had heard that Miles was crazy. Withers had heard that Miles had been institutionalized for killing some people in Southern California, had escaped to the Mendocino County, and was living in the area under an assumed name. Withers said that she was not positive that the person she had heard about was Miles, but indicated that she was checking on this information.

Jacobelli and Heimann denied being Withers's source for the information she told the jury that they gave her. Heimann testified that he did not think that any of the concerns that Withers expressed to him about Miles were valid. They denied telling Withers that Miles had no real interest in the environment. Heimann did not think Miles had a mental health problem. He thought she was a shy, nonviolent person.

G. *Deliberations and Verdict*

At the close of evidence, Sierra Club moved for nonsuit on agency grounds. Guenther and Withers also moved for a directed verdict. Each of these motions was denied. Sierra Club twice moved for nonsuit on the issue of punitive damages, succeeding the second time. Of the 24 statements that Miles claimed were defamatory, the trial court instructed the jury that two of them were defamatory on their face, if untrue—those statements stating that Miles had been institutionalized and was paranoid. The trial court also ruled—as a matter of law—that Miles was a limited purpose public figure and that the case involved a matter of public concern. It based this ruling on the nature of the controversy at issue in the case and Miles's role in it. Thus, the trial court required Miles to prove by clear and convincing evidence that Guenther,

Withers and the Sierra Club knew that the statements were false or published them with reckless disregard of whether or not it was false and defamatory.

On September 18, 2002, the jury returned a special verdict, concluding that Guenther's letter contained false and defamatory statements about Miles, but concluding that she did not show by clear and convincing evidence that the defamation or defamations were knowingly false or made with reckless disregard of the truth. A jury poll revealed that nine of the 12 jurors concluded that Miles did not demonstrate clear and convincing evidence that the statement or statements were made with knowing falsity or reckless disregard for the truth.

In October 2002, the trial court entered judgment on the special verdict, finding that the Sierra Club, Guenther and Withers were entitled to judgment and that Miles should take nothing from the defendants. Notice of entry of judgment was given on October 24, 2002. Miles filed a timely notice of intent to move for a new trial. At the close of a December 20, 2002 hearing, the trial court orally denied her motion for new trial. An order denying Miles's motion for new trial was filed on January 29, 2003.

II. LIMITED PURPOSE PUBLIC FIGURE

A. *Legal Standard*

Miles's main contention on appeal is that the trial court erred by finding that she was a limited purpose public figure. This conclusion required her to prove actual malice in order to recover damages for defamation—a burden of proof that she asserts was too high, given her view that she was merely a private figure.[23] At trial, Miles repeatedly testified that she did not

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[23] In support of this argument, Miles cites Finke v. Walt Disney Co. (2003) 110 Cal.App.4th 1210 in her November 7, 2003 opening brief.

intend to inject herself into a public controversy such that she would become a limited purpose public figure. However, the trial court ruled as a matter of law that Miles *was* a limited purpose public figure for purposes of her defamation action. She objected to this ruling and formally challenged it in her motion for new trial, without success. In order to resolve the question that Miles poses on appeal, we must first ground ourselves in the law applicable to such defamation cases.

The First Amendment to the United States Constitution guarantees that political debates on issues of public concern may be uninhibited, robust and wide open. As such, speech arising directly from political debates is entitled to greater constitutional protection than other types of speech. (*Kaufman v. Fidelity Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 913, 919; see *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340 (*Gertz*).) Thus, the First Amendment imposes limits on a state's authority to award damages for defamation. It prohibits a public official from recovering damages in an action for defamation relating to his or her official conduct without proof that the allegedly false statement was made with actual malice. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 262, cert. den. *sub nom. Globe International, Inc. v. Khawar* (1999) 526 U.S. 1114 (*Khawar*); *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1163.) In such a case, the plaintiff must prove actual malice by clear and convincing evidence. (*Bose Corp. v. Consumers Union of U. S., Inc.*

Five days after she filed this brief, the California Supreme Court granted review in this case. (S118936, review granted Nov. 12, 2003.) After the case settled, the California Supreme Court dismissed review. We may not cite or consider an opinion that has been superseded by a grant of review. (Cal. Rules of Court, rule 976(d)(1).)

(1984) 466 U. S. 485, 511, fn. 30; *Khawar, supra,* 19 Cal.4th at p. 275; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252, cert. den. *sub nom. Synanon Church v. Reader's Digest Assn., Inc.* (1986) 478 U.S. 1009; *Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 255-256; see *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1046.)

The same rule applies to private plaintiffs who can be viewed as public figures. (*Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 133-134, 155; *Khawar, supra,* 19 Cal.4th at pp. 262-263; *Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1163.) Public figures fall into two categories. One is an all-purpose public figure who has achieved such pervasive power and influence that he or she becomes a public figure for all purposes and in all contexts. The second is the *limited purpose public figure* who voluntarily injects himself or herself or is drawn into a particular public controversy and thus becomes a public figure for a limited range of issues. (*Gertz, supra,* 418 U.S. at pp. 345, 351; *Khawar, supra,* 19 Cal.4th at p. 263; *Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1163.) In either case, the public figure assumes "special prominence in the resolution of public questions." (*Gertz, supra,* 418 U.S. at p. 351; *Khawar, supra,* 19 Cal.4th at p. 263.)

The United States Supreme Court requires actual malice in defamation actions brought by public officials and public figures for two reasons. First, these persons usually enjoy significantly greater media access, giving them a more effective means to defend their reputations against false statements than private individuals have. (*Gertz, supra,* 418 U.S. at p. 344; *Khawar, supra,* 19 Cal.4th at pp. 263, 265.) Second, public officials and public figures have voluntarily invited comment and criticism by injecting themselves into public controversy, thereby exposing themselves to an increased risk of injury

from defamatory falsehoods. (*Gertz, supra,* 418 U.S. at p. 345; *Khawar, supra,* 19 Cal.4th at pp. 263, 265.)

The determination of whether the plaintiff is a limited purpose public figure—and, if so, for what limited purpose—is often a close question that can only be resolved by considering the totality of the circumstances comprising each individual controversy. (*Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 255; *Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1163.) At trial, the issue whether a plaintiff in a defamation action is a public figure is a question of law for the trial court to determine. (*Khawar, supra,* 19 Cal.4th at p. 264; *Reader's Digest Assn. v. Superior Court, supra,* 37 Cal.3d at p. 252; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845.) On appeal, we review the trial court's resolution of disputed factual questions bearing on its public figure determination for substantial evidence. The trial court's resolution of the legal issue of whether the plaintiff is a public figure is an issue on which we conduct an independent review. (*Khawar, supra,* 19 Cal.4th at p. 264; see *Wolston v. Reader's Digest Assn., Inc.* (1979) 443 U.S. 157, 166-168; *Gertz, supra,* 418 U.S. at p. 352.) We review the trial court's determination of related credibility issues based on the clearly erroneous standard. When we do so, we consider the whole record and examine the statements in issue and the circumstances under which they were made in order to determine whether they are of a character that the principles of the First Amendment protect. (*Khawar, supra,* 19 Cal.4th at p. 275; see *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 686.)

There are three steps to the inquiry of whether a plaintiff is a limited purpose public figure. We must determine that there was a public controversy; that the plaintiff voluntarily played a significant role in that controversy; and that the defendant's allegedly defamatory statement pertained to the plaintiff's

participation in the controversy. (*Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1163; *Copp v. Paxton, supra,* 45 Cal.App.4th at p. 845; see *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1296, cert. den. 449 U.S. 898 (*Waldbaum*).)

B. *Facts Bearing on Limited Purpose Public Figure Status*

The evidence at trial offered three strands of activity that could arguably support the trial court's finding that Miles *was* a limited purpose public figure—her public stand against the Mileck dump, her nine-month crusade against the Mendocino/Lake Group and its executive committee, and her "M" cartoons.

On the Mileck dump issue, Miles—giving her name as Mary Goodwin, although the parties to this lawsuit all knew who she was—appeared at a public hearing to oppose the project. Despite the fact that she shared the outlook of an association of neighborhood opponents, they grew so frustrated with her that she was ejected from their group. She wrote an article about the issue, even though she later testified that she did not intend by these acts to inject herself into the Mileck dump issue as a public figure. Her criticism of Withers and the local Sierra Club group after the hearing inspired an Anderson Valley Advertiser column and a firestorm of rebuttal to it during July 1998. The newspaper went so far as to charge that Miles had a grudge against Withers and the Sierra Club. This was clearly a matter of much public interest and Miles—in her Mary Goodwin personae—was at the center of it, thrust there by her own actions.

With regard to her request for Sierra Club information or her attempt to remove the Mendocino/Lake Group's executive committee, Miles did not regard this issue as newsworthy, either. Pope and Guenther did not regard her efforts to reform the group as a public matter,

but Bruce Anderson made it clear that in his judgment as a local newspaper publisher, Miles's efforts to unseat leaders of the local Sierra Club group were, in fact, newsworthy. The record on appeal contains sufficient evidence to satisfy us of the newsworthiness of Miles's challenge to the local Sierra Club group leadership.

We find it significant that Miles's interest in the internal workings of the Mendocino/Lake Group followed closely on the heels of published criticism of her opinions about the Sierra Club's activities related to the Mileck dump project. Her first correspondence with the various subdivisions of the Sierra Club began within days of the Anderson Valley Advertiser's published accusation that she had a personal axe to grind with Withers and the Mendocino/Lake Group. Her challenge to the local group was ongoing, with a regular stream of correspondence and contact from August 1998 until May of the following year. Miles testified that she did not give any press interviews on her interest in the workings of the Sierra Club. However, this testimony ignores the obvious connection between the Mileck dump controversy that she instigated in the July 15, 1998 edition of the Anderson Valley Advertiser, the double-barreled response to her criticism that appeared in the July 22, 1998 newspaper, and her campaign against the Sierra Club beginning on August 1 of that year. There was ample evidence from which the trial court could reasonably infer that Miles instigated the July 1998 press coverage through her friend Rob Anderson, and that her 10-month crusade against the executive committee of the Mendocino/Lake Group was in retaliation for articles critical of her published views on the Mileck dump issue. Thus, we are satisfied that the Mileck dump and internal workings of the Sierra Club

were connected issues for purposes of our limited purpose public figure status analysis. [24]

Miles's cartoons present a third possible strand of evidence that may be relevant to a limited purpose public figure finding. Guenther and Withers reasoned that by her cartoons, Miles injected herself into a public controversy. Miles rejected this argument as speculative. She cited her use of the pseudonym "M" in support of her claim that she had not injected herself into any public controversy by her drawings, but had striven to remain a private person despite their publication. [25]

Miles's view that her cartoons do not bear on our limited purpose public figure analysis is predicated on her belief that very few people knew that she was "M." There was ample evidence at trial to find, to the contrary, that Miles was known as "M" by the time that the March 31 letter was published. Evidence was offered from several witnesses supporting the conclusion that it was well known by members of the local environmental community—including Guenther and Withers—that "M" was Miles. In the words of publisher Bruce Anderson, Miles's secret identity was "[n]o secret at all." If the record supports the implied factual finding that people knew that Miles was "M," then she cannot cloak herself in the protective garb of anonymity in order to have the March 31 letter judged as if it were written about a private

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[24] Thus, we reject Miles's attempts to dismiss this link between the Mileck dump issue and her challenge to the local Sierra Club group's leadership.

[25] Miles had argued against admission of her "M" cartoons into evidence, without success. She reasoned that the cartoons were irrelevant to any issue in the defamation action, including the issue of whether or not she was a public figure or a limited purpose public figure. She reasoned instead that she was a private person, which she argued would make the defendants strictly liable for their defamatory statements.

individual rather than against the backdrop of the acts of one who had published ten years of illustrative criticism of local political and environmental actors.

This raises another predicate factual issue—the nature of the "M" cartoons. Miles testified that no one had characterized these cartoons to her as disturbing and she denied that the illustrations advocated violence. By contrast, Guenther and Withers testified that they were disturbing, violent and frightening. Many of these cartoons were admitted into evidence, over Miles's objections. Only a cursory glance at a few of these cartoons is required before one may reasonably conclude—despite Miles's protestations to the contrary—that some of them are *quite* disturbing.

Miles argues that as she stopped publishing the cartoons long before the events that led to the March 31 letter, they were no longer probative on the issue of whether she was a limited purpose public figure. At trial, Bruce Anderson testified that the cartoons inspired intense interest among his readers. Again, the briefest review of those cartoons bears out this testimony. After a 10-year run, the last of these cartoons appears to have been published in 1996. This was only two years before the Mileck dump issue brought Miles back onto the pages of the Anderson Valley Advertiser and only three years before the March 31 letter. The vividness of these cartoons, the intensity of local interest in them and the length of time during which they were published satisfies us that these drawings remained relevant to the issue of whether Miles was a limited purpose public figure for purposes of this defamation action.

C. *Application of Three-pronged Test*

Our first step is to determine whether Miles was involved in a public controversy. (*Waldbaum, supra,* 627 F.2d at p. 1296.) The United States Supreme Court has not specifically defined the meaning of the term "public

controversy." However, the Court of Appeals for the District of Columbia has defined a "public controversy" as a dispute that has actually received public attention because the ramifications of the dispute will be felt by persons beyond the direct participants in it. (*Ibid.*) If an issue was the subject of public debate and had foreseeable, substantial ramifications for persons other than the participants, it constitutes a public controversy. (*Id.* at p. 1297.) California courts apply this definition. (*Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1164; see *Copp v. Paxton, supra,* 45 Cal.App.4th at pp. 845-846.)

A public controversy is not simply a matter of general interest to the public, but is a real dispute that has actually received public attention. Its outcome must affect all or some of the general public by having appreciable consequences for nonparticipants. By contrast, concerns or disagreements that are essentially private do not become public controversies simply because they attract attention. (*Time, Inc. v. Firestone* (1976) 424 U.S. 448, 454-455; *Waldbaum, supra,* 627 F.2d at p. 1296 & fn. 23.) The public airing of the dispute must arise *before* the allegedly defamatory statement was made. (See *Waldbaum, supra,* 627 F.2d at p. 1297; see also *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 134-135.)

In this matter, we define the public controversy as whether the Mendocino/Lake Group of the Sierra Club was performing as effectively as local environmentalists would wish. Miles would have us view this as a purely internal Sierra Club matter. This ignores the evidence offered at trial that after the Mileck dump public hearing, a public controversy arose in the local community about whether the Sierra Club—most particularly, Withers—had failed to challenge this project as Miles believed that it should. Miles suggested in her criticism of Withers and the local Sierra Club group that leaders other than those

on the executive committee would do a better job of using the clout of the Sierra Club to improve the local environment. In some communities, this might be a private dispute, but in the hotbed of environmentalism in which Miles and Withers operated, the issue became a public controversy.

The record on appeal supports an inference that published accusations of Withers made in the summer of 1998 were the direct result of Miles's complaints to her friend Rob Anderson. His column denouncing Withers's efforts prompted, in turn, a pair of rebuttals in the Anderson Valley Advertiser—one from the newspaper's publisher and one from Withers herself. Stinging from criticism rebounding onto Miles after her own complaints were challenged, she retaliated against Withers with a 10-month campaign against the Mendocino/Lake Group's executive committee. Thus, the public controversy Miles created out of her dissatisfaction over Withers's efforts on the Mileck Dump project evolved into a campaign against the local Sierra Club group.

The second step in the public controversy analysis is to consider the plaintiff's role in the public controversy. Trivial or tangential participation is not enough. The plaintiff must have " 'thrust [himself or herself] to the forefront' " of a public controversy, becoming a factor in the ultimate resolution of it. (*Waldbaum, supra*, 627 F.2d at p. 1297; see *Gertz, supra*, 418 U.S. at p. 345.) He or she must have achieved special prominence in the debate about the public controversy. (*Gertz, supra*, 418 U.S. at p. 351; *Waldbaum, supra*, 627 F.2d at p. 1297.) The plaintiff either must have been intentionally trying to influence the outcome or could realistically have been expected—because of his or her position in the controversy—to have an impact on its resolution. In this analysis, the trial court considers the plaintiff's past conduct, the extent of press coverage, and the public

reaction to his or her conduct and statements. (*Waldbaum, supra,* 627 F.2d at p. 1297.)

By definition, a limited purpose public figure plays or attempts to play a major role in influencing one aspect of society. Courts must make a particularized inquiry into the circumstances of his or her case. If, in fact, he or she shapes or tries to shape the outcome of a specific public controversy, he or she is a public figure for that particular controversy. (*Waldbaum, supra,* 627 F.2d at p. 1298 fn. 32.) Those who attempt to affect the result of a particular controversy have assumed the risk that the press covering the controversy will critically examine him or her as a major participant. We must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy and whether the alleged defamation was related to that controversy. (*Id.* at p. 1298.)

Measured against this standard, there is no question that Miles had thrust herself into the public controversy over the effectiveness of the local Sierra Club group's environmental efforts. (See *Waldbaum, supra,* 627 F.2d at p. 1297; see also *Gertz, supra,* 418 U.S. at p. 345.) She prompted Rob Anderson to publish an article critical of those efforts, achieving a special prominence in the debate on this controversy. (See *Gertz, supra,* 418 U.S. at p. 351; *Waldbaum, supra,* 627 F.2d at p. 1297.) When her own criticism backfired into press accounts that were critical of *her*, Miles engaged in a 10-month crusade to unseat the executive committee, trying to influence the outcome of the controversy or to have an impact on its resolution. (See *Waldbaum, supra,* 627 F.2d at p. 1297.) We consider Miles's past conduct such as her "M" cartoons and her response to the Mileck dump project; the extent of press coverage, especially during July 1998; and the public reaction to her conduct and statements. (See, e.g., *ibid.*) All of these factors reinforce our conclusion

that Miles's role in the public controversy was sufficient to warrant her limited purpose public figure status.

The third step in the limited purpose public figure analysis is to determine if the allegedly defamatory statement pertained to the plaintiff's participation in the controversy. His or her talents, education, experience, and motives could be relevant to the public's decision whether to listen to him or her. (*Waldbaum, supra,* 627 F.2d at p. 1298; see *Copp v. Paxton, supra,* 45 Cal.App.4th at p. 846.) On appeal, Miles contends that even if she became publicly associated with the Mileck dump project and the issues depicted in her "M" cartoons, she had not voluntarily injected herself into a public controversy that is germane to the defamatory statements in the March 31 letter. We find Miles's inquiry to be too narrow. The record satisfies us that fallout from the Mileck dump issue and Miles's subsequent challenge to the Mendocino/Lake Group's executive committee were intimately connected with each other. Thus viewed, the statements in the March 31 letter all pertained to the part Miles played in the ongoing controversy—begun in the aftermath of the criticism she received after the Mileck dump issue—of whether the executive committee of the Mendocino/Lake Group of the Sierra Club was effectively defending local environmental interests. These statements focused on her background and her motives, which the letter suggested were not trustworthy.

As we find all three prongs of the test to be met, we conclude that the trial court properly found that Miles was a limited purpose public figure. As a limited purpose public figure, Miles was properly required to prove actual malice in order to recover damages for defamation. (*New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 279-280; *Khawar, supra,* 19 Cal.4th at pp. 262, 275.) Our conclusion is reinforced by the reasoning underlying the actual malice requirement. Miles's significant media access and her voluntary acts of injecting herself into the

question of whether the local Sierra Club group was effectively run are evidence of her limited purpose public figure status. (*See Gertz, supra,* 418 U.S. at pp. 344-345; *Khawar, supra,* 19 Cal.4th at pp. 263, 265.) As she was properly determined to be a limited purpose public figure, the trial court did not err in requiring her to prove actual malice in order to recover damages in her action for defamation.

III. DETERMINATION OF ACTUAL MALICE

A. *Trial Court Proceedings*

Even if the trial court properly concluded that she was a limited purpose public figure, Miles contends that it also erred by requiring jurors to evaluate each of 24 allegedly false and defamatory statements for actual malice on a separate, statement-by-statement basis. She reasons that as long as nine jurors concluded that any one of the allegedly defamatory statements in the March 31 letter was made with actual malice, she may recover damages for defamation even if those jurors disagreed on which particular statement was maliciously made. Instead, she asserts, the special verdict form was ambiguous and the trial court failed to cure the ambiguity by instructing the jury that they need not agree on which of the defamatory statements in the March 31 letter were published with malice, as long as nine of them agreed that the respondents acted with malice.

In the trial court, the jury was given a special verdict form to answer. It contained two questions pertinent to this appeal—first, whether the jurors believed that the March 31 letter contained false and defamatory statements about Miles, and second, whether, based on clear and convincing evidence, the jury concluded that the "defamation(s)" were knowingly false or made with reckless disregard for the truth. Miles had alleged that the March 31 letter contained as many as 24 false and defamatory statements. Two of these 24 statements were

defamatory as a matter of law. The trial court instructed the jury that it had to determine whether these two statements were true or false. On the remaining 22 statements, the jury was instructed to determine whether each was both defamatory and false. If any statement was found to be both defamatory and false, the special verdict form instructed the jurors to reach the additional issue of actual malice.

During deliberations, the jurors sought clarification from the trial court about how they were to consider the issues put to them. They wrote the judge and asked whether they were to come to a consensus on the 24 allegedly defamatory statements. After counsel met and drafted a response to this inquiry, the trial court instructed the jury with the agreed-upon response. On the two statements that the jurors had been instructed were defamatory on their face, they were instructed that "[a]ny nine jurors must agree that a statement . . . is false." On the remaining 22 statements that were not defamatory as a matter of law, the trial court told the jury that "any nine jurors must agree that a statement . . . is defamatory and false." This written response was delivered to the jury.

The jury then returned a special verdict against Miles, finding that false and defamatory statements were made, but finding no clear and convincing evidence of actual malice. When the jury was polled on the two specific questions it answered, they unanimously agreed that false and defamatory statements about Miles were contained in the March 31 letter. However, the jurors' response to the poll about actual malice was confused. One juror explained that the jury had considered whether 24 statements were maliciously made. The jury had arrived at different votes of nine or more jurors about different statements. The same nine or more jurors did not necessarily vote the same way on the actual malice question on each statement. Overall, nine or more jurors

agreed that the evidence did not support a finding of malice by clear and convincing evidence.

Outside the presence of the jury, the trial court and counsel conferred briefly off the record. Back in court with the jury, the trial court stated that the poll on actual malice was inconsistent with the special verdict the jury had submitted on this question. The jurors were specifically told that if nine or more jurors could agree on an answer to a question posed in the special verdict, that would be sufficient. The same nine or more jurors did not need to agree on each answer to each question. The trial court invited the jurors to submit written questions if this response was not clear. The jurors then retired to continue deliberations on question of actual malice.

Minutes later, the jury returned with the same verdict—that false and defamatory statements had been made, but that Miles did not prove by clear and convincing evidence that they were made with malice. Again, the jurors were polled about their individual verdicts. Again, confusion arose about the accuracy of the poll responses to the actual malice question. The trial court rephrased the poll question and this time, nine of the 12 jurors agreed that the special verdict response that Miles did not prove malice by clear and convincing evidence was his or her individual response.

Miles's attorney asked the trial court to determine whether the jurors understood that all they had to do was find one of the 24 statements had been maliciously made. He stated that this inquiry was "consistent with our objections to the ambiguity of the [special verdict] form." The trial court declined to conduct further inquiry and discharged the jury.

B. *Invited Error*

On appeal, Miles complains that the special verdict form misled the jurors into thinking that they had to consider each of 24 statements on a statement-by-

statement basis when asked to find whether the defendant published the statements with actual malice. She reasons that she should be entitled to recover damages for defamation if nine jurors believed that Sierra Club, Guenther and Withers acted with the requisite malice, even if those nine jurors were unable to agree which statement was made with malice. In so doing, she would have us extend a case applying to a civil suit for fraudulent misrepresentation to a defamation case. (See *Stoner v. Williams* (1996) 46 Cal.App.4th 986, 993-1004.)

Before we may address the merits of this complicated question, we must first consider the preliminary question of whether Miles invited any error that may have been committed. Although she argues otherwise in her reply brief, Miles's contention in her opening brief specifically challenges the special verdict form. In her opening brief, she argues that the second question posed in the special verdict form—asking whether the "defamation(s)" were made with the requisite level of malice—erroneously suggested to the jury that it needed to find that each and every defamatory statement was made with malice. Even her complaint that the trial court failed to properly respond to the jury's questions about the form is, in essence, an assertion that the trial court had a duty to cure the ambiguity contained in the special verdict form. Thus, we are satisfied that—regardless of how it is couched—Miles's claim of error pertains to the special verdict form.

Miles did not bring this asserted ambiguity to the trial court's attention before the special verdict form went to the jury. Earlier versions of the special verdict form that Miles submitted for the court's use were no less ambiguous about whether nine of the jurors had to find *all defamatory statements* to be malicious or *only one of them* in order to find malice by clear and convincing evidence. The final form of the special verdict—the one that was submitted to the jury—bears the initials of both attorneys

representing Miles at trial in this case. These initials indicate Miles's approval of the *form* of the special verdict.

In the absence of a timely objection raised before the special verdict form is submitted to the jury, we presume that a party agreed to the form of the questions presented. A party may not complain of defects in a special verdict form for the first time on appeal, but has waived them by failing to raise them in the trial court. (See *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 fn. 8 [special verdict]; *Cembrook v. Sterling Drug Inc.* (1964) 231 Cal.App.2d 52, 63.) A fortiori, when a party *approved* the special verdict form and her own proposed special verdict form contained the *same* ambiguity that she now claims misled the jury, we find that she is barred from raising this claim of error on appeal.

Miles protests that her special verdict form was submitted after the trial court ruled against her on the substance of the form, over her objection. When a party submits a special verdict form in order to make the best of a bad situation, the invited error rule does not apply. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.) However, the dispute over the special verdict form was about whether Miles was a limited purpose public figure. The objection to an unrelated matter does not bear on the objection she now raises to the form of the second special verdict question. As such, we conclude that Miles cannot invoke that unrelated objection to avoid application of the invited error rule.

In order to prevail on the merits, Miles has to establish that the special verdict form was actually ambiguous, that it probably misled the jury, and that it was reasonably likely that she was prejudiced by it. (See, e.g., *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 938-939.) Even assuming arguendo that we found that Miles proved each of these necessary elements of her claim of

error, she invited that error by incorporating it into her own proposed special verdict forms. (See *Mary M. v. City of Los Angeles, supra,* 54 Cal.3d at p. 212; *Myers Building Industries, Ltd. v. Interface Technology, Inc., supra,* 13 Cal.App.4th at p. 960 fn. 8 [special verdict]; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 384, pp. 435-436.) Thus, she waived this issue in the trial court.

The judgment is affirmed.

REARDON, J.

WE CONCUR:

SEPULVEDA, J.
RIVERA, J.

APPENDIX B

Court of Appeal, First Appellate District, Division Four –
No.A101437
S134409

IN THE SUPREME COURT OF CALIFORNIA
En Banc

MARY MILES,
Plaintiff and Appellant,

v.

SIERRA CLUB et al.,
Defendants and Respondents.

FILED July 13, 2005

Petition for review DENIED.

GEORGE, C.J., was absent and did not participate.

/s/
WERDEGAR, Acting C.J.

APPENDIX C

Michael S. Ward #178648
FITZGERALD, ABBOTT & BEARDSLEY LLP
1221 Broadway, 21st Floor
Oakland, California 94612
Telephone: (510) 451-3300
Facsimile: (510 451-1257
Attorneys for Defendant Sierra Club

FILED OCT. 24,2002

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MARY MILES (an individual), Plaintiff

vs.

SIERRA CLUB (a corporation); RON GUENTHER (an individual); ROANNE WITHERS and DOES 2 through 50, inclusive, Defendants

Case No. 311109
(Unlimited Civil Action)

JUDGMENT ON JURY VERDICT

This action came on regularly for trial on August 27, 2002, in Department 606 of the Superior Court, the Honorable John Conway, Judge, presiding; the plaintiff appearing by attorneys David Hicks, Esq. and Carleton Briggs, Esq. The defendant Sierra Club appearing by attorney Michael Ward, Esq.

A jury of twelve persons was regularly empaneled and sworn. Witnesses were sworn and testified. After

hearing the evidence and arguments of counsel, the jury was duly instructed by the court and the cause was submitted to the jury with directions to return a verdict on special issues.

Prior to submission to the jury, the Court granted Defendant Sierra Club's motion for a nonsuit as to the issue of plaintiff's entitlement to punitive damages against the Sierra Club.

Also prior to submission to the jury, the Court determined, based on the nature of the controversy at issue in this case and the Plaintiff's role in that controversy, that, as a matter of law, Plaintiff was a limited public figure and the case involved a matter of public concern.

The jury deliberated and thereafter returned into court with its verdict as follows:

1. Did Guenther's letter contain false and defamatory statements about plaintiff? Answer Yes.
2. By clear and convincing evidence was the defamation(s) knowingly false or made with reckless disregard of the truth? Answer No.

The jury was polled as follows:

Question No 1: 12 votes "yes." 0 votes "no."

Question No 2: 9 votes "no." 3 votes "yes."

It appearing by reason of said verdict that defendants are entitled to judgment against plaintiff,

NOW AND THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff take nothing from said defendants and that defendants recover their costs in the amount of $ _____.

Dated: October 24, 2002

/s/ John J. Conway, Judge of the Superior Court

APPENDIX D

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MINUTES

December 20, 2002 Courtroom 606

MILES, Plaintiff

vs.

SIERRA CLUB, Defendant

_____/

Case Number: CGC-00-311109
Nature of Cause:
MOTION FOR NEW TRIAL

Present:
Judge: John J. Conway
Reporter: Janet Pond
Clerk: John Stokes
Bailiff: Not Present
Appearing: Miles; Sierra Club
Carleton L. Briggs for Plaintiff (by telephone)
Michael S. Ward for Defendant Sierra Club
Phillip S. Berry for Defendants Ron Guenther and Roanne Withers

---

Plaintiff's motion to strike Defendant's points and authorities in opposition to Plaintiff's motion for new trial is denied. After arguments by respective counsel, plaintiff's motion for a new trial is denied.

APPENDIX E

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

MARY MILES,
Plaintiff and Appellant

FILED
May 13, 2005

v.

SIERRA CLUB et al.,
Defendant and Respondent

No. A101437
San Francisco County No. 311109

BY THE COURT:

The petition for rehearing is denied.

/s/
KAY, P.J

Date: May 13, 2005

APPENDIX F

SIERRA CLUB
FOUNDED 1892

Mendocino/Lake Group
P.O. Box 2330
Fort Bragg, CA 95437
(707) 961-1953

To: Carl Pope, Executive Director
Sierra Club

From: Ron Guenther, Chair
Sierra Club Mendocino/Lake Group

Date: March 31, 1999

Re: Request for Mendocino/Lake Groups records and Mary Miles

Because you have failed to inform yourself, I am taking the time to write this *ad rem.* What if I, as a member, requested that you send the last 10 years of the Sierra Club National records to the Mendocino/Lake Group by April 2nd, using only volunteer help and with no funding so that I may review them, for reasons known only to myself? I think you might find this just a bit unreasonable. On March 30th your office issued such a request for the Mendocino/Lake Group records to be delivered to your office by April 1 so that alleged member Mary Miles could look at them.

The following will help you understand the unreasonableness of your request and our dilemma—

The Mendocino/Lake Group (MLG) has no evidence in its subvention records showing that Mary Miles is a member of Sierra Club. According to conversations that Redwood Chapter Chair Marianne de Sobrino has had with other members, Mary Miles expressed an interest in MLG several months ago at the Chapter level. De Sobrino has not discussed this with me, nor has she sent me any explanation or copies of correspondence, even though I have requested this in writing twice.

Despite our lack of evidence that Mary Miles is a Sierra Club member and not knowing the nature of her complaint, MLG Ex-Comm members Mary Walsh, I and others have all at different times over several months, in the very beginning of this episode and before we knew what was happening, personally invited Mary Miles to attend our meetings at the Fort Bragg Library public meeting room and other venues. She has never attended. [Page 1 of 4]

Apparently there is some sort of complaint from Mary Miles, though I have no idea exactly what it is. Again, I have no copies of correspondence between the Chapter or National and Mary Miles. I did receive a request from Miles for copies of the last 10 years of Mendocino/Lake Group records on March 10th which included a 10 day deadline to produce this. This request was denied on March 16th. (Correspondence attached.)

I understand the requirements of Corporations Code Section 6333 as well as the Sierra Club National bylaws. I have never received any indication from Mary Miles as to what her "interest as a member" (if she indeed, is a member) might be in reviewing the last 10

years of MLG records. I do not view a request from Mary Miles for MLG records from 10 years ago as "reasonably related" to any interest any Sierra Club member would have. According to the bylaws her only legitimate interest as a member is in elections, records pertaining to elections, and in attending Sierra Club meetings. Elections for the Redwood Chapter and MLG Ex-Comms are conducted through the Redwood Chapter and all records pertaining to this are located with the Chapter. MLG meeting notices are published in the local newspapers.

While Corporations Code 6333 might seem to broaden a member's "interests" beyond that of the Sierra Club bylaws, a "reasonable interest" in the minutes from 10 years ago has not been established by Miles through her attendance in a meeting where she would have some specific question that could be answered by these minutes. Absent this, she seems to be on a fishing expedition for some unknown reason. For further reasons outlined below, I believe caution is the best strategy here for the Club.

I have never met Mary Miles. Based on our inquiries of several long-time inland Mendocino County environmental groups and individuals who personally know Miles, some of these have been subjected to the similar circumstances that we are experiencing. Some have expressed that she has not demonstrated any real interest in the conservation of the environment. According to these folks, she has demonstrated, under the initial pretense of an interest in the environment, a severe and irrational pathological obsession with the minutia details of "records" of groups for unknown, unexplainable reasons. Others claim that she irrationally believes "environmental groups or individuals are focused on and out to get her personally". According to one of these folks, Mary Miles has been institutionalized in the past and is on the verge of a serious breakdown again. Also

she has several aliases that she uses to disguise her true identity, and makes repeated request for the same documents via letters, each time under a different name. One of our members who has had personal contact with Mary Miles at one public hearing believes she is very dangerous in a physical sense and is frightened of her. I can supply names and phone numbers of leading environmentalists, and newspaper reporters, publishers and editors who I am sure will speak with you, if you wish to verify this yourself. I believe some may be willing to testify in court to Miles' irrational and frightening behavior.

Miles' harassment of MLG through the Redwood Chapter began several months ago and is escalating in its severity. My own personal opinion is that Miles has now irrationally fixated on MLG similar to other [Page 2 of 4] groups' past experiences. There is no rhyme nor reason, no political agenda or rational purpose for her behavior, according to others. She simply requests "copies of records" because she can. It's the copy making exercise that she seems to be very interested in. She has abused unaware people involved in conservation efforts through phone calls starting with seemingly important questions about environmental issues but then disintegrates into irrational demands and paranoid accusations. I consider her to be a most dangerous paranoid schizophrenic. The invitations to attend our meetings were given with much trepidation.

I am puzzled at your office asking us to send 10 years worth of MLG documents to your office under a 2 day deadline without any investigation into the matter. "Send the documents first, then we can talk" is the gist of the phone call from Devorah Ancel.

I cannot ask our over-worked volunteers to set aside their employment, family obligations and conservation work to comply with your request, for it will

certainly mean resignations and non-renewal of Sierra Club memberships among our key people. No-one wants to use their precious time to feed this sort of harassment and insanity by Miles or become her next target through their membership in Sierra Club. Nor do we believe that sending our records to your office will resolve the matter once and for all. Based on other groups' and individuals' experience it is just the beginning of her search for new individuals and groups to harass that are unaware of her activities and reputation.

Even if we tried to comply with your 2 day deadline we could not gather all the records together. Our treasurer is in Texas and will be gone for a week or so. Our current financial records are located at her house. Our historical records are stored at an elderly former secretary's house who is not certain exactly where they are except "under a ton of stuff". She will have to hire help to move heavy boxes and furniture. Our newly elected secretary has just received documents for the last two years from her predecessor who has resigned. Our new secretary believes these records are somewhat incomplete. It is my understanding that the former secretary has just left on an extensive cross country tour for Julia Butterfly so we have no way of inquiring after the missing documents at this time. We are, after all, volunteers with no funds to manage an office or pay a staff person to manage our affairs.

Our next meeting is at the Fort Bragg Library on May 1st at 4:00. Perhaps Mary Miles could come to this meeting and review what we have on hand. We are discussing the option of having a police officer in attendance if indeed, we all concluded offering this review opportunity is a solution. If she exhibits usual disruptive behavior she can then be asked to leave by the officer.

In my 45 years as a very active Sierra Club leader, and the last 12 years as the elected Chair of the MLG, I have never received a complaint from any Group member over anything I or the countless volunteers that I have worked closely with have done (other than Mary Miles who, alleging membership, called me to complain about the Group's endorsement of a judge several years ago). The MLG is one of the hardest working and effective of any Sierra Club Group. The Group and its activities are supported by our [Page 3 of 4] members and are widely respected. Therefore, I wonder why we have not been supported in turn by an investigation by the Club into this matter in order to assist us in finding a solution that protects Sierra Club members from a frightening individual.

/S/

Ron Guenther, Chair
Sierra Club Mendocino/Lake Group

cc: Redwood Chapter Chair
MLG Ex-Comm members
Interested members:
Ellen and David Drell, Willits Environment Center
Linda McClure, Mendocino Environment Center
Richard Johnson, Editor/Pulisher *Mendocino County Enviromentalist* [sic]
Bruce Anderson, Editor/Publisher *Anderson Valley Advertisor* [sic]
Mary Pi[illegible], President, Redwood Coast Watersheds Association
Alan L[illegible]ne, Coast Action Group/Friends of the Garcia River

2

Supreme Court, U.S.
FILED
NOV 23 2005
OFFICE OF THE CLERK

No. 05-523

In The Supreme Court of the United States

MARY MILES,

Petitioner,

vs.

SIERRA CLUB, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL S. WARD
Counsel of Record
MARK A. DELGADO
FITZGERALD ABBOTT & BEARDSLEY LLP
1221 Broadway, 21st Floor
Oakland, California 94612
Telephone: (510) 451-3300

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether the First Amendment requires that a defamed individual who is a known activist be considered a "limited purpose public figure" where that individual voluntarily accepts a leadership position in a local political dispute, engages the press to criticize other participants in that dispute, and promptly initiates further action against those other participants, all of which is linked to the subsequent defamatory communication.

(2) Whether, in determining if an individual is a limited purpose public figure, the political activist background of that individual is a relevant consideration for a court in evaluating the individual's voluntary participation in a local public controversy and the likelihood that the individual's participation in the controversy is a matter of public discussion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Sierra Club respectfully submits this Corporate Disclosure Statement. Respondent Sierra Club, a California nonprofit public benefit corporation, is not a publicly held company, and there is no parent or publicly held company owning 10% or more of the stock of Sierra Club.

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STATEMENT OF THE CASE

This defamation action arises from a March 31, 1999 letter written by individual Respondents, Ron Guenther ("Guenther") and Roanne Withers ("Withers"), local leaders of Respondent Sierra Club ("Sierra Club") in the Mendocino/Lake Counties region of California. Petitioner Mary Miles ("Petitioner" or "Miles"), a self-styled local environmentalist and the subject of the letter, brought suit, claiming that the letter defamed her.

The controversy at the center of this case took place in the environmentally sensitive Mendocino and Lake Counties region in Northern California. (Reporter's Transcript ["RT"] 242-43, 490, 895-98, 901-902, 1218-19). Respondent Sierra Club had a significant presence in local environmental issues in the area. The Mendo/Lake Group of the Sierra Club was led by its Executive Committee of local volunteers, including Respondents Ron Guenther and Roanne Withers. (RT 898-99, 907) Plaintiff, described by her friends as an environmental activist, was also active in local environmental issues, as well as known for more than a decade for political cartoons she published in a local newspaper, the Anderson Valley Advertiser ("AVA"). (RT 490, 522, 230, 492, 512, 514, 537-38, 1230-32, 1233-34, 1463, Trial Exhibit ["Ex."] 1) The targets of the cartoons frequently included both national figures, and individuals involved in local political disputes. (RT 582-90, 594-95, 599-601, 602, 607-11, 976-77, 1230-35, 1447-48, Exs. 1, E, F, X, Y) Many of the cartoons were violent, offensive or vicious in their criticism of the target subjects, and a number focused on significant local environmental issues and members of the conservation community. (*Id.*, RT 971-76, 1228, 1516-20) Miles did not save all of her attacks for the newspaper. Instead, she regularly confronted

environmental groups she disagreed with. (RT 345, 1219-20, 1[illegible]-26, 1268-71, 1335-37, 1455-56, 1457-60)

In the spring of 1998, Miles' attention turned to the Sierra Club's activities in relation to public hearings over the Cole Creek Compost Facility – known locally as the Mileck Dump – which was being developed in Mendocino County. The Mileck Dump had been one of the targets of Miles' cartoons. (RT 599-604, 1250, 1447-48) The conservation leaders involved in the controversy over the dump, and active in waste management issues throughout the county, had also repeatedly felt the sting of her pen. (*Id.*) Given its environmental impact, the Mileck Dump controversy was the subject of press coverage and significant public debate. (RT 617-19, 1246-51)

In May 1998, Miles appeared on behalf of a neighborhood group opposing the dump, in order to present the group's public comment. (RT 262-63, 617-19) The hearing followed legal action by neighbors against the dump, leading to a court order requiring public hearings on the dump's environmental impact. (RT 1231; 1331-33) During the hearing process, Miles met and requested assistance from Withers and the Sierra Club. (RT 1331-39) Withers provided assistance, but was unable to satisfy Miles. In a series of confrontations with Withers in person and on the phone, Miles not only accused the Sierra Club of failing her, but again articulated her long series of purported grievances with local conservation groups. (RT 1334-39, 1354-58, 1371-73, 1376). Ultimately, as the opposition to the dump "unraveled," the AVA reported that Miles was thrown out of the neighborhood group. (RT 1337)

Immediately after the hearings, Miles assisted her friend, Rob Anderson, the brother of AVA publisher Bruce

Anderson, in writing a series of articles in the AVA on the Mileck Dump controversy that applauded her efforts and publicly criticized Withers and the Sierra Club. (RT 617-19, 650-51, 736-38, 1250-52, 1256, 1331-32) Bruce Anderson wrote articles in response, as did Withers, at Bruce Anderson's invitation. (*Id.*) Miles also wrote her own article on the dump controversies. (RT 619) The entire series appeared between July 15 and July 22, 1998. (RT 1251-52)

Less than two weeks after the conclusion of the Mileck Dump articles and Miles' angry interactions with Withers, Miles began writing a series of lengthy letters to the Club's Redwood Chapter attacking Withers, Guenther, and the rest of the Group's Executive Committee. (RT 642-43, 648, 652-53, 1339-40) She accused the local group leaders of improper elections and meetings based on her unverified conclusion that they had not been publicized and her erroneous belief that the Group ran its own elections, and initiated an attempt to split the local Group in half. (RT 234-35, 644, 647-49, 651-59, 661-63, 696, 900-901) She accused the Group of being a coastal "clique" which ignored inland environmental issues, a charge the Group vigorously denied. (RT 237, 242-243, 897-98; 665-69)

Ultimately, in the letters to the Redwood Chapter, Miles demanded that the entire local leadership of the Group be permanently banned from holding positions within the Sierra Club. (RT 658-59, 661-63) Her requested remedy was unprecedented throughout the entire Sierra Club organization. (RT 1144) If successful, Appellant's campaign would have eliminated the region's most respected and experienced environmentalists from Group leadership. (RT 894-99, 913-16, 1236-37, 1361-62, 1463-64; Ex. 14)

In the midst of her efforts to oust the Executive Committee of the Mendo/Lake Group, Miles sent a letter directly to the Group in March 1999, demanding without warning or explanation more than ten years of Group financial and meeting records. (RT 294-96, 917-18, Ex. 5) The Executive Committee, consisting entirely of volunteers working with a budget of $2000 from the national organization, objected to the unexplained demand from an individual that was not on their membership roster as unreasonable, excessive and unwarranted. (*Id.*, 290, 904-905, 928-29, 968, Ex. 3)

Undaunted, Miles communicated the records demand to Carl Pope, the executive director and chief executive officer of the Sierra Club, at the Club's headquarters in San Francisco. (RT 1134, 1147-48, Ex. 4) Pope confirmed that Miles was in fact a Sierra Club member, and had a message passed to the local group that *some* of her demands were legitimate under California law and must be complied with. (RT 1141, 1202)

When they first received Miles' March, 1999 record demand, Guenther and Withers spoke with acquaintances in the conservation community to deepen their understanding of her motives and practices. (RT 931-32, 934, 940, 1340-42, 1364-69, 1371-73) Based on their knowledge and inquiry, upon receipt of the instructions from the Sierra Club headquarters to produce some records, Guenther and Withers sent Carl Pope a strongly worded letter objecting to the records demand. (Ex. 2) The letter, the March 31, 1999 communication at issue in this case, set forth the information they had received and their own conclusions about Miles' motives and mental state. (*Id.*) Guenther and Withers copied the letter not only to local and Chapter leadership of the Club, but also to environmental

leaders in the region whom they feared would be the subject of similar attacks by Miles. (RT 921-25, 926-27, 1373-75, 1376) Included among the copy recipients was Bruce Anderson, who held several committee positions within the Sierra Club and had provided background information to Guenther and Withers. (RT 940-41, 1235)

The AVA continued its coverage of both the Mileck Dump controversy, and Miles' role in that controversy, as well as her subsequent, related attack on the Sierra Club, including an article in April, 1999. (Ex. 6, RT 1259) The AVA published another article in October, 2000, after this lawsuit was filed, entitled "Crazy Mary v. the Sierra Club," based on Bruce Anderson's ten year personal relationship with Miles. (RT 1219-20, 1260-61) Anderson made numerous statements in the article to the effect that Miles was "nuts" based on his own independent interactions with her, and then attached as a footnote a copy of Guenther and Withers' March, 1999 letter to Carl Pope. (RT 1260-61, 1263, 1288-89)

ARGUMENT

I. PETITIONER'S ASSERTION THAT THE CALIFORNIA COURT OF APPEAL INCORRECTLY APPLIED THIS COURT'S RULING IN *GERTZ V. ROBERT WELCH, INC.*, 418 U.S. 323 (1974) IS BOTH INSUFFICIENT GROUNDS FOR REVIEW AND MERITLESS

Petitioner's first "reason" which she claims supports granting her writ in this case is that the California Court of Appeal, First Appellate District, in its unpublished opinion, purportedly misapplied the "limited purpose

public figure" standard established by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny. Petition for Writ of Certiorari ("Pet.") at 8-13. Petitioner does not claim that the state appellate court misstated the *Gertz* standard, but rather that the lower court misapplied the standard by ignoring key elements required to find a limited purpose public figure. On its face, Petitioner's primary argument reveals the weakness of her writ petition, as certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Additionally, in challenging the state appellate court's limited purpose public figure determination, Petitioner distorts or ignores entirely much of the factual evidence supporting that court's ruling. Petitioner's primary argument is thus a thinly-veiled attempt to further litigate her disagreement with the California trial and appellate courts' interpretation of the evidentiary record. Once again, this argument provides no legitimate basis for review by this Court.

In fact, as set forth below, the state Court of Appeal correctly applied the *Gertz* rule that a defamation plaintiff becomes a limited purpose public figure only when that plaintiff has voluntarily injected herself into a specific public controversy in order to affect its outcome. The state appellate court also correctly determined that the defamatory communication in this case related to Miles' participation in the public controversy. As such, the state court's application of *Gertz* provides no grounds for granting Miles' writ in this case.

A. The State Appellate Court Properly Identified the Existence of a Relevant Public Controversy Related to the Mileck Dump

Petitioner argues in her petition that the lower court in this case failed to identify a relevant public controversy. Pet. at 13. In making this claim, Petitioner attempts to evade the significance of the Mileck Dump dispute. As set forth above, the Mileck Dump had been the focus of a neighborhood group protest and legal action for years, and had been satirized in Petitioner's own political cartoons. The neighborhood group and others opposing the Dump continued their activity at the public hearing over the dump in May, 1998. As such, the public was not only debating the Dump; members of the community were actively and publicly fighting against it.

The article series in the AVA *continued* the public debate over Mileck and focused on the role of the parties in this case in that dispute. Petitioner attempts to question the public nature of the dispute by ignoring the connection between the public neighborhood challenges at the Mileck hearings, and the subsequent press coverage – an attempt correctly rejected by the state Court of Appeal. *See* Pet. at A-29.

B. Contrary to Petitioner's Assertion, the Court of Appeal Did Not Ignore the Requirement That a Plaintiff Must Have Injected Herself Into a Public Controversy in Order to be a Limited Purpose Public Figure

Throughout section I of her petition, Petitioner disputes, as she did below, that she injected herself into the public debate surrounding the Mileck Dump. Again, her

disagreement with the state appellate court over this finding is not a proper grounds for review by this Court, and is badly misplaced.

First, Petitioner attempts to downplay her role at Mileck by asserting that mere attendance at a public hearing is insufficient to support a limited purpose public figure finding. Pet. at 14. Yet, as the state appellate court recognized, Miles' participation at the hearing was more than mere attendance. Carrying the weight of her known reputation as an environmental activist and local political commentator, Miles took a leadership role in the neighborhood opposition at the dump hearings, engaged with the Sierra Club leadership in an attempt to increase opposition resources, and ultimately sparred with that leadership when she was unsatisfied with the Club's participation at Mileck.

Petitioner also, as she did below, disputes the evidentiary record which supported a finding that she assisted her friend Robert Anderson in his articles critical of the Sierra Club's role at Mileck, just as she ignores her own article on the controversy. (See RT 617:13-619:18, 650:9-651:2, 736:24-738:3, 1250:16-1252:15, 1256:13-15, 1331:3-1332:4) Miles' stubborn refusal to accept the implication of involvement in the press series created by her own, and other key witnesses' testimony is not a proper subject for review by this Court. The state appellate court considered this evidence, and rejected Appellant's claim that she was not involved in the articles criticizing the Sierra Club. Pet at A-32, 33.

Additionally, Petitioner's observation that she did not copy the press with her subsequent letter-writing campaign against the same local leadership of the Sierra Club

is irrelevant given the wealth of evidence in the record – cited by the Court of Appeal – that Petitioner participated in *public* hearings and engaged the *public* through the local media. Pet. at 15, A-32. The fact that some of Petitioner's conduct was not made public does not preclude her from being deemed a limited purpose public figure. No court has adopted a rigid formula that *all* of the plaintiff's conduct that relates to a public controversy must be in the public view in order for the plaintiff to be a limited public figure. *See, e.g. Waldbaum v. Fairchild Publications., Inc.*, 627 F.2d 1287, 1299-1301 (D.C. Cir. 1980) (no requirement that all aspects of CEO's management be public for him to be limited purpose public figure). Any such a mechanical standard would eviscerate public figure speech protections by allowing individuals who have voluntarily injected themselves into a public controversy to shield some portion of their conduct from criticism regardless of its relevance to the public debate. Once again, the Court of Appeal below correctly determined that Petitioner's voluntary participation in the Mileck Dump controversy in tandem with the press coverage critical of the Sierra Club which she helped generate made her a limited purpose public figure in relation to her related campaign against the Sierra Club. Pet. at A-39 – A-40.

C. The Court of Appeal Correctly Determined That the March 31, 1999 Letter Was Germane to the Public Controversy Over the Mileck Dump, and the Sierra Club's Role in the Local Environmental Dispute

Miles' Petition relies on yet another factual contention rejected by the lower court in asserting that the "defamation in the March 31, 1999 letter had nothing to do with

that issue [concerning the effectiveness of the Sierra Club Group]." Pet. at 17. The state Court of Appeal found that the March 1999 letter was "intimately connected" to the dispute over the Sierra Club's role and effectiveness in the Mileck Dump controversy. As a result, the state Court of Appeal expressly "reject[ed] Miles' attempts to dismiss th[e] link between the Mileck dump issue and her challenge to the local Sierra Club group's leadership." Pet. at A-34 n.24. The record clearly supports that determination.

Petitioner's campaign against the local leadership of the Club began *immediately* on the heels of the press coverage in the AVA of the Mileck Dump and the Sierra Club's effectiveness. The letter-writing campaign, which included the records demand to the local group, relied on the same criticisms of the local leadership's effectiveness that Petitioner raised during the Mileck Dump hearings and press coverage. The individual Respondents' letter indisputably challenged Petitioner's motives and mental state behind her attack on the local leadership, and therefore was clearly germane to the relevant controversy. *See Waldbaum*, 627 F.2d 1287, 1298 (discussion of plaintiff's "talents, education, experience, and motives" are relevant to public's decision to listen to plaintiff). The Appellate Court's determination of germaneness was both correct and consistent with applicable authority.

D. Petitioner's Contention That "Unrelated" Prior Conduct Cannot be Considered Under the *Gertz* Test Is Both Irrelevant to this Case and Incorrect

Petitioner also asks this Court to grant certiorari to determine whether prior, "unrelated" conduct is relevant to an individual's classification as a limited purpose public

figure. Pet. at 27. Certiorari should be denied because the California Court of Appeal found that, on the facts of *this* case, all of the conduct considered by the lower court – including Miles' publication of political cartoons on subjects that included local environmental issues such as the Mileck Dump – *was* related to the controversy surrounding the effectiveness of the Mendo/Lake Group of the Sierra Club. With respect to the cartoons, the lower court found that their vividness, the intensity of local interest in them, and the closeness in time between their publication and the long-standing Mileck dispute render them related and relevant to the limited purpose public figure question. Pet at A-34 – A-35.

Further, the lower court indisputably considered Miles' long record of political commentary and activism as background for evaluating her access to press, the likelihood that her participation at Mileck was part of an affirmative attempt to effect the outcome of a particular public debate, and the likelihood that the public would discuss and debate her role in that controversy. Pet. A-38 – A-39. In challenging this use of relevant background information, Petitioner apparently reads the *Gertz* opinion and its progeny as requiring that defamation plaintiffs' conduct in a particular public dispute be considered completely in isolation from the plaintiffs' background, experience and expertise. No court has articulated such a standard that would handcuff courts in their attempt to understand a plaintiff's role in a particular debate, and the Court should decline to consider such an extreme argument.

II. PETITIONER HAS NOT DEMONSTRATED A CONFLICT AMONG THE FEDERAL OR STATE COURTS REGARDING THE SCOPE AND/OR APPLICATION OF THE LIMITED PURPOSE PUBLIC FIGURE DOCTRINE THAT WOULD WARRANT REVIEW OF THE OPINION BELOW

The legal principles that govern the decision in this case have been well established by this Court and the federal courts generally for nearly three decades, since this Court's decision in *Gertz*. Nevertheless, Petitioner seeks to have this case reviewed because of the supposed necessity of "flesh[ing] out the skeletal descriptions" of public figures and private persons under the limited purpose public figure doctrine. Pet. at 19.

In the *Gertz* opinion itself, this Court recognized that, given the myriad of factual scenarios involving participation in public debate, the public figure test would be best served by "broad rules of general application." From that first opinion, this Court therefore properly rejected the Petitioner's invitation to create more factually-specific tests that would, in effect, require the Court to "scrutinize carefully every jury verdict in every libel case." *Id.* at 343-44.

Petitioner's complaint with *Gertz* and its progeny does not point to any significant, substantive dispute among courts in relation to the applicable standard. Nor does she articulate any particular, more specific standard that should prevail. As such, particularly given the proper application of the standard by the lower court in this case, the petition should be rejected.

A. Courts, Including The Lower Court In This Case, Consistently Require That the Defamation Relate to an Existing Public Controversy

In seeking review by this Court, Petitioner makes the remarkable observation that the courts have been *consistent* in their application of the *Gertz* standard. Pet. at 21-22. As Petitioner concedes, the D.C. Circuit Court of Appeal recognized in 1980 that *Gertz* mandated that the defamatory communication relate to an existing public controversy in order for the plaintiff to be a limited purpose public figure. *Waldbaum*, 627 F.2d 1287, 1296, 197 (D.C. Cir. 1980).

As discussed above, the state Court of Appeal determined that a direct link existed between the Mileck Dump controversy, the subsequent public exchange between the parties over the effectiveness of the Sierra Club, and the defamatory communication. The lower court therefore followed precisely the well-settled standard for the limited purpose public figure determination. Again, Petitioner's refusal to accept the link found by the lower court is not sufficient to warrant review by this Court.

B. Courts Consistently Hold That a Limited Purpose Public Figure Must Have Thrust Herself Into a Public Controversy in Order to Affect the Resolution of the Issues Involved

Equally untenable is Petitioner's claim that "[a] number of lower courts, including the Court of Appeal in this case, are in direct conflict with this Court's requirement of a high threshold of public activity for an individual to become a limited purpose public figure." Pet. at 22.

Plaintiff's citation to a handful of cases that have outcomes she questions, on its face, is insufficient to establish a conflict worthy of Supreme Court review. Notably, she does not claim that any of these cases ignored the *Gertz* requirement that plaintiff "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

In fact, Petitioner begins by citing *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003), a D.C. Circuit opinion which expressly followed both this Court's *Gertz* ruling and the *Waldbaum* decision relied on extensively by Petitioner. Pet. at 23. Petitioner takes issue with the determination of the *Lohrenz* court that the decision by the female plaintiff to accept a role as a combat fighter pilot unquestionably was a voluntary act which knowingly thrust herself into an existing public controversy. According to the *Lohrenz* court, that act, coupled with the plaintiff's ready access to media channels, was sufficient to make her a limited purpose public figure. *Id.* at 1281-82. Petitioner's complaint about *Lohrenz* apparently focuses on the volume of public conduct, a factor that appears to relate to no standard in any case she cites. Petitioner's argument with the result of *Lohrenz* does not point to the existence of any significant conflict among the courts nor any pressing need for further clarification of *Gertz*.

The remaining decisions that Petitioner claims are inconsistent with *Gertz* or in conflict with other rulings in other jurisdictions, also reflect, at most, courts applying consistent principles to a variety of challenging factual scenarios at the threshold of the public/private figure distinction. *See Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (attorney was a public figure in controversy over drug trafficking because

his indictment as part of a drug trafficking ring and his representation of gang members was highly publicized; he voluntarily associated himself with gangs that he knew were the subject of media attention); *Rosanova v. Playboy Enterprises*, 580 F.2d 859 (5th Cir. 1979) (plaintiff's highly publicized criminal activities and his associations with organized crime, coupled with his voluntary associations with public personalities, warranted the imposition of public figure status as it related to the public controversy surrounding organized crime); *Faigin v. Kelly*, 978 F. Supp. 420 (D.M.H. 1997) (sports agent who had regular contact with the press, periodically appeared on radio and television shows and promoted himself nationally, thrust himself to the forefront of a high-profile community of sports agents that attracted media attention). The existence of difficult cases does not create a need for this Court to review the *Gertz* standard even if reasonable judges would disagree over the outcomes of those specific cases.

Finally, even if some deep "rift" did exist over the amount of public conduct needed to satisfy the public figure standard, this case would not be an appropriate vehicle for addressing that issue. As the lower court correctly recognized, Petitioner's participation in the Mileck Dump controversy, and the subsequent targeting of the local Sierra Club leadership, would likely satisfy any of the courts she cites that she was a limited purpose public figure.

C. Courts, Including the Court Below, Have Consistently Held That the Defamatory Statements Must Be Germane to the Public Controversy at Issue

As set forth in section I.C., above, the state appellate court in this case unquestionably determined that the defamation at issue in this case was germane to the Mileck Dump dispute and the subsequent, linked criticism of the Sierra Club's effectiveness. As such, Petitioner's recitation of the non-controversial requirement that the defamation relate to a public dispute (Pet. at 26) provides no grounds for granting this writ.

D. The California Court of Appeal's Consideration of Miles' Prior Conduct Fits Squarely With the Consistent Decisions of Other Courts

Petitioner concedes that the D.C. Circuit's widely-cited *Waldbaum* decision recognized the propriety of considering a plaintiff's background in evaluating that plaintiff's participation in a specific public controversy. Pet. at 27-28. Similarly, in this case, the state Court of Appeal considered Miles' history of activism and political cartoons in evaluating the voluntariness of her participation in the Mileck dispute, and its likely impact on the public. Nothing in *Gertz* or this Court's public figure jurisprudence suggests that such an evaluation is improper.

Nevertheless, Petitioner seeks to manufacture a conflict of law by relying on the California Supreme Court's decision in *Khawar v. Globe Internat., Inc.*, 19 Cal.4th 254 (1998) In *Khawar,* the California Supreme

Court held that the plaintiff's decision to stand near Robert Kennedy shortly before he was assassinated could not establish plaintiff as a limited purpose public figure in relation to the public controversy surrounding the assassination "because there was no way the plaintiff could have known the senator would soon be assassinated." *Khawar*, 19 Cal.4th 254, 266-67 (1998).

The court in *Khawar* did not, as Petitioner contends, hold that a libel plaintiff's conduct occurring before the relevant controversy is *per se* irrelevant to the limited purpose public figure determination. Instead, the California Supreme Court merely recognized that in relation to the unique and unanticipated dramatic events in that case, the unsuspecting plaintiff's prior conduct could not be relevant.

It is a very different matter for a court to consider the background of an environmental activist and political commentator who involves herself in an ongoing local environmental dispute. No case cited by plaintiff has held or suggested that consideration of the plaintiff's background in such circumstances is improper. As such, no conflict exists warranting granting of the Petition in this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL S. WARD
Counsel of Record
MARK A. DELGADO
FITZGERALD ABBOTT & BEARDSLEY LLP
1221 Broadway, 21st Floor
Oakland, California 94612
Telephone: (510) 451-3300

Attorneys for Respondents

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In The

Supreme Court of the United States

MARY MILES,

Petitioner,

v.

SIERRA CLUB et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL RICHARD KLEVEN
Counsel for Petitioner
1604 Solano Avenue
Berkeley, California 94707
(510) 528-7347

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INTRODUCTION

Recognizing that petitioner Mary Miles never engaged in any public conduct designed to affect the outcome of the "public controversy" identified by the Court of Appeal, respondents Sierra Club, *et al.* introduce a different controversy in an attempt to show that Miles was a limited purpose public figure.

But the public conduct this Court has consistently held to be a prerequisite for imposing the burdens of the public figure classification on private individuals is absent from this case. Unfortunately, in the quarter century since this Court last addressed that classification, the lower courts have reached widely conflicting results in thousands of such cases. While ostensibly claiming to follow this Court's precedents, lower courts have often denied recovery to deserving libel victims who have done nothing to expose themselves to the risk of being defamed.

Respondents barely acknowledge the chaotic state of the case law in the courts below, while selectively embracing a line of cases that has treated private individuals as public figures even though they made no public effort to affect the outcome of any public controversy.

A jury in this case unanimously found that respondents published false, defamatory statements about Miles in their March 31, 1999 letter. It is undisputed that Miles was never an all-purpose public figure. Miles took no public steps to affect the outcome of either alleged controversy, and neither controversy "gave rise" to the defamatory statements in the letter.

The Court should grant this petition.

ARGUMENT

THE CONSTITUTION REQUIRES ONLY THOSE WHO HAVE ENGAGED IN PUBLIC CONDUCT TO AFFECT THE OUTCOME OF A PARTICULAR PUBLIC CONTROVERSY TO BE CLASSIFIED AS LIMITED PURPOSE PUBLIC FIGURES

A. Respondents' Disagreement With The Court Of Appeal Over The Identification Of The Relevant Public Controversy Reinforces The Need For The Court To Clarify The Public Controversy Requirement

After acknowledging that a defamed individual can be classified as a limited purpose public figure only if she "has voluntarily injected herself into a specific public controversy in order to affect its outcome," Brief for the Respondents In Opposition to Petition for Writ of Certiorari ("RB") 6, respondents insist that the Court of Appeal identified "the Mileck Dump" as the relevant public controversy in this case. RB 7.

This is not true. The Court of Appeal "defin[ed] the public controversy as whether the Mendocino/Lake Group of the Sierra Club was performing as effectively as local environmentalists would wish," a controversy that the court determined had arisen *after* the Mileck dump hearing. App. A at A-36.

While respondents agree that the identification of a particular public controversy is a threshold requirement for classifying someone as a limited purpose public figure, RB 13, their implicit recognition that the Court of Appeal identified the wrong controversy reinforces the need for this Court to clarify the "particular public controvers[y]"

requirement established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) ("*Gertz*").

B. This Court Should End The Conflict In The Lower Courts By Reaffirming That The Limited Purpose Public Figure Classification Applies Only To Those Who Have Voluntarily Thrust Themselves Into A Particular Public Controversy

There was, of course, no public controversy over the effectiveness of the local Sierra Club Group. Miles' efforts to form an inland group consisted solely of private letters to Sierra Club officials, and she made no effort to discuss the issue with the public or the media. Petition for a Writ of Certiorari ("Pet.") 3, 7-8, 13-16, 21-25. Under *Gertz*, 418 U.S. at 345, 351-52, the lack of any public conduct in connection with an actual public controversy should have ensured that Miles would be considered a private individual.

Respondents argue that, "no court has adopted a rigid formula that *all* of the plaintiff's conduct that relates to a public controversy must be in the public view." RB 8-9 (emphasis in original). While even all-purpose public figures necessarily engage in some private conduct, respondents' argument ignores the irreducible, defining quality of every limited purpose public figure – some form of *public* conduct undertaken to influence the outcome of a particular public controversy. *Gertz*, 418 U.S. at 345, 351-52; *Time, Inc. v. Firestone*, 424 U.S. 448, 453-54 (1976); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 166-67 (1979); *Khawar v. Globe Internat., Inc.*, 19 Cal. 4th 254, 266-67 (1998).

Even accepting respondents' claim that the public controversy was the Mileck dump, not the effectiveness of the local Sierra Club Group, there was no public conduct related to the Mileck dump sufficient to require Miles to shoulder the burdens imposed on limited purpose public figures. Attendance at a public hearing is insufficient to confer public figure status on a private individual, *Gertz*, 418 U.S. at 352; Pet. 14.[1]

In an effort to bolster their claim that Miles was a limited purpose public figure despite the absence of public conduct, respondents argue that she was an "activist" and point to her publication of political cartoons in the past. RB 1-2, 7-11, 13-17.

Although such factors should be relevant only if the plaintiff was an all-purpose public figure who has achieved "general fame or notoriety in the community, and pervasive involvement in the affairs of society," *Gertz*, 418 U.S. at 351-52, respondents derive support for their position from a line of federal court cases that have obliterated the careful distinctions laid down by this Court between the different types of public figures. RB 13-15.

Ignoring the Circuit and state courts that follow this Court's holdings, Pet. 24-25, respondents contend that decisions of the Third, Fifth and District of Columbia Circuits, and the District of New Hampshire, do not

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[1] Miles will not attempt to correct all of the misstatements of fact in the RB; but respondents' repeated claim that Miles had addressed the Mileck dump in her cartoons, RB 2, 7, 11, is entirely fabricated. Miles' last cartoon was published in 1996, two years before the Mileck issue arose. App. A at A-35; Reporter's Transcript ("RT") 602, 1233. There was no evidence that Miles took a leadership role at the hearing or played any role in the Rob Anderson column. RT 264-65, 618-20, 650-51.

conflict with *Gertz* and its progeny, even though the court in each instance classified the plaintiffs as limited purpose public figures without any evidence that the defamed individuals had attempted to affect the outcome of a particular public controversy.[2]

Respondents even contend, RB 14, that Miles has not claimed that these rogue cases ignore *Gertz*, though that is precisely what they do and exactly what she has argued. Pet. 22-25. These holdings require relatively obscure individuals to meet an often insurmountable burden of proof even when they have done nothing to voluntarily inject themselves into a particular public controversy. In jurisdictions governed by these cases, this Court's attempt to "define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment" has been seriously compromised. *Gertz*, 418 U.S. at 325.

While acknowledging the possibility of "some deep 'rift,'" RB 15, between respondents' favored cases and those cited by Miles, respondents argue that this case would "not be an appropriate vehicle for addressing that issue," claiming Miles would be considered a limited purpose public figure under any test. But this case would actually be an excellent vehicle for this Court to re-establish the proper Constitutional accommodation and resolve the conflict in the courts below over whether the First Amendment requires public conduct in a particular

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[2] *Lohrenz v. Donnelly*, 350 F.3d 1272, 1278-82 (D.C. Cir. 2003); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1082-87 (3d Cir. 1985); *Rosanova v. Playboy Enterprises*, 580 F.2d 859, 860 (5th Cir. 1979); *Faigin v. Kelly*, 978 F.Supp. 420, 427-28 (D.N.H. 1997).

public controversy for limited purpose public figure classification. The respondents point to no case imposing limited purpose public figure status on an individual for such activities as writing private correspondence.

Even if Miles were an activist,[3] this Court has repeatedly held that "participation in community and professional affairs" does not obviate the requirement that, to be a limited purpose public figure, she must also engage in public conduct in relation to a specific public controversy. *Gertz*, 418 U.S. at 352. *Gertz*, 418 U.S. at 325-26, 351-52, and *Firestone*, 424 U.S. at 453-54, held that even prominent people are not limited purpose public figures unless they voluntarily participate in a specific, subsequent controversy so as to affect its outcome.

In the absence of any claim that Miles was an all-purpose public figure, the question of whether she was an activist has no bearing on her classification. *Gertz*, 418 U.S. at 352.

C. Certiorari Should Be Granted To Resolve The Conflict In The Lower Courts Over Whether Prior Conduct Can Make An Individual A Limited Purpose Public Figure In A Subsequent, Unrelated Public Controversy

Similarly, this case provides the Court with a perfect opportunity to establish that prior, unrelated conduct – such as Miles' cartoons – does not transform a private

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[3] The only witness who identified Miles as an activist also stated that she was "the most non-public figure I know." RT 522.

individual into a limited purpose public figure in a subsequent public controversy. RB 10-11, 16-17; App. A at A-34-35; Pet. 18-19, 27-28.

There is no need, as respondents suggest, RB 16, for Miles to "seek to manufacture a conflict of law" on this issue, because there is a square conflict between the decisions of the District of Columbia Circuit,[4] and the holdings of this Court and the California Supreme Court. *Khawar v. Globe Internat., Inc.*, 19 Cal. 4th 254 (1998) ("*Khawar*").

Respondents are simply wrong to insist that *Khawar* did not establish a *per se* rule regarding prior conduct, RB 17; *Khawar* held that a plaintiff's conduct that occurred before the relevant controversy arose was "of no legal significance" in the limited purpose public figure determination. *Khawar*, 19 Cal. 4th at 266-67. Under *Khawar*, Miles' cartoons, for example, are clearly inadmissible, because they occurred before the controversy arose; but a court following *Clyburn* would admit the cartoons.

Basing limited purpose public figure classification on prior, unrelated conduct negates the *Gertz* distinction between all-purpose and limited purpose public figures, improperly subjecting "all aspects" of every libel plaintiff's life to the public figure inquiry. *Gertz*, 418 U.S. at 352.

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[4] *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297-98 (D.C. Cir. 1980).

D. Unless An Individual's Participation In A Public Controversy Gives Rise To The Defamation, She Cannot Be Considered A Limited Purpose Public Figure

Respondents have no legal or factual support for their claim that the defamatory statements in their letter were "germane" to either of the alleged public controversies. RB 9-10, 16. Respondents' defamatory March 31, 1999 letter makes no reference to the Mileck dump or to the July 1998 articles, and the letter itself states that it is in response to Carl Pope's March 30, 1999 directive that the Group produce the records that Miles had requested. App. F at A-51; RT 1051-52.

Although *Gertz*, 418 U.S. at 352, requires that the individual's public conduct in a particular public controversy must "giv[e] rise" to the defamation, respondents do not even attempt to show that Miles' conduct gave rise to the letter's false and defamatory statements that, for example, Miles was a "most dangerous paranoid schizophrenic" who had been "institutionalized." App. F at A-53-54. Even using the "germane" standard enunciated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980) and relied on by respondents, these outrageous libels did not pertain to Miles' "talents, education, experience, and motives." RB 10.

This abandonment of the "giving rise" requirement by the Court of Appeal and certain other lower courts, Pet. 26-27, is a significant conflict regarding the proper determination of limited purpose public figure status that this Court should resolve.

CONCLUSION

The First Amendment does not require any special protection for those who destroy the reputations of private figures. *Gertz*, 418 U.S. at 343.

As this Court has also recognized:

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.

Gertz, 418 U.S. at 340, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

For all the above reasons, a writ of certiorari should issue to the Court of Appeal of California, First Appellate District.

Respectfully submitted,

PAUL RICHARD KLEVEN
Counsel for Petitioner
1604 Solano Avenue
Berkeley, California 94707
(510) 528-7347